Supreme Court, U.S.
FILED

081524 JUN 10 2009

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No. _____

In the Supreme Court of the United States

TEXAS WATER DEVELOPMENT BOARD,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After performing an Environmental Assessment (EA) and issuing a Finding Of No Significant Impact (FONSI), in lieu of preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h, the U.S. Fish and Wildlife Service (FWS) established the 25,281-acre Neches River National Wildlife Refuge (NRNWR or Refuge) as a wintering habitat for migrating waterfowl. The creation of the Refuge, however, conflicted with plans that the State of Texas and the City of Dallas had for building a reservoir on the same land (Fastrill Reservoir or Lake Fastrill) in order to provide a future water supply for Dallas residents and others. This case presents the following question:

> Whether NEPA § 102(C), 42 U.S.C. § 4332(C), requires a federal agency to prepare an EIS when the agency's proposed action conflicts with a State's long-range planning efforts to provide a future water supply for its citizens.

LIST OF ALL PARTIES TO THE PROCEEDING

The petitioners to this proceeding are:

- Texas Water Development Board
  (variously, TWDB, the Board, or the State); and
- The City of Dallas, Texas.

The respondents to this proceeding are:

- H. Dale Hall,[1]
  Director of the U.S. Fish and Wildlife Service;
- Dirk Kempthorne,[2]
  Secretary of the U.S. Department of the Interior;
- Benjamin N. Tuggle,
  Regional Director of the Southwest Region (Region 2) of the U.S. Fish and Wildlife Service;
- The United States Department of the Interior; and
- The U.S. Fish and Wildlife Service
  (variously, FWS or the Service).

---

1. Director Hall has ceased to hold this office; Rowan W. Gould currently serves as the Acting Director. *See* S. CT. R. 35(3).

2. Secretary Kempthorne has ceased to hold this office; Ken Salazar is the current Secretary. *See id.*

CONVENTIONS USED IN CITING TO THE RECORD

In this petition, the following conventions may be used in citing to the record:

- (Volume #).USCA5.(Page #) = the record on appeal;
- (Volume #).AR.(Page #) = administrative record appearing on 3 CDs, containing volumes 1-9 of documents; the CDs were filed by FWS, with volumes 1-8 appearing on the CD dated "March 2007", and volume 9 appearing on 2 CDs bearing the label "Volume 9 Supplement to Administrative Records";
- (Volume #).AR10.(Page #) = volume 10 of the administrative record appearing on 1 CD, labeled "Vol. 10", filed by FWS;
- (Document #).TWDB.(Page #) = TWDB documents appearing on 1 CD, labeled "Volume 11", filed by FWS;
- (Document #).FOIA.(Page #) = FOIA documents requested by the City of Dallas appearing on 1 CD, labeled "Volume 11", filed by FWS;
- (Exhibit #).C.(Page #) = supplemental documents to the administrative record requested by the City of Dallas appearing on 1 CD, labeled "Volume 11", filed by FWS; and
- (Document #).A.(Page #) = FWS documents appearing on 1 CD, labeled "Volume 11", filed by FWS.

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INTRODUCTION

"Texas is blessed with a bountiful supply of water, although it is not always in the right place at the right time, nor of the right quality."[3]

"The State of Texas has large quantities of water, but not where it is most needed. . . . Th[e] growing demand from Texas's cities is driving much of the conflict . . . between the need for water for the

3. RONALD A. KAISER, JR., HANDBOOK OF TEXAS WATER LAW: PROBLEMS AND NEEDS 3 (2002).

environment and the consumptive needs of the [S]tate's population."[4]

Nearly 50 years ago the idea of establishing the Fastrill Reservoir in east Texas to capture and store millions of gallons of water from the Upper Neches River between Anderson and Cherokee Counties was conceived.[5] Since then, Fastrill Reservoir has continually been part of state, regional, and local water planning schemes.[6] The City of Dallas is one of the "expected beneficiaries of the dependable water supply afforded by the development of Fastrill Reservoir".[7]

But those plans have been all but destroyed by FWS's establishment of the NRNWR in 2006 on the same lands as the proposed Fastrill Reservoir. Undoing the refuge designation would require either an act of Congress or extraordinary administrative processes.[8] Not surprisingly,

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4. Suzanne Schwartz, *Whiskey Is for Drinking, Water Is for Fighting: a Texas Perspective on the Issues and Pressures Relating to Conflicts over Water*, 38 TEX. TECH L. REV. 1011, 1011-12 (2006).

5. 8.USCA5.3858-60; 1.TWDB.2-11.

6. 2.TWDB.12, .56 (1984 State Water Plan); 3.TWDB.64, .83 (1997 State Water Plan); 4.TWDB.84, .123 (2001 Region I Water Plan); 5.TWDB.134, .218 (2006 Region I Water Plan); 8.TWDB.237, .338, .344, .354-55 (2006 Region C Water Plan); 5.USCA5.2344 (stating that 2007 State Water Plan notes that Fastrill Reservoir is identified in regional water plans as necessary to meet consumptive needs).

7. 5.TWDB.218.

8. *See* 16 U.S.C. § 668dd(a)(3); *see also* 1.USCA5.102, .150, .355.

neither of these is a realistic option for the State and the City.

Thus, the lower courts' decisions to confirm the establishment of the Refuge without requiring FWS to first perform an environmental impact statement—in common parlance, an EIS—under the National Environmental Policy Act, or NEPA, fosters a conflict between the State and FWS. One the one hand, the State is interested in providing for the future consumptive water needs of the residents of one of Texas's largest cities, Dallas. On the other hand, the federal government is interested in providing a wintering habitat for migrating waterfowl. Undeniably, both interests are important matters of public concern.

The clash between these interests manifests itself in primarily two ways. First, there is the question whether these competing claims over the same lands and water resource can be reconciled such that the two interests may coexist harmoniously. This question begets a second question (the one that is central to this case: whether NEPA requires a federal agency to consider, in something more than a cursory assessment, the long-range water supply plans of a State by performing an EIS that takes a "hard look" at the environmental impacts that a competing federal wildlife refuge proposal will have on the human environment; or, whether an agency may avoid preparation of an EIS simply by claiming that: (1) a State's long-term water supply plans are too far beyond the "planning horizon" of the proposed federal project, and (2) in any event, the designation of a refuge boundary that leaves nature alone -effectively, "inaction"- does not

effect a change in the environmental *status quo* that triggers NEPA's EIS requirement.

The Fifth Circuit has answered no to the first question and yes to the second. Its decision has several important implications. *First*, as a consequence of the court's holdings and reasoning, federal agencies have been given enormous preemptive power over state water projects, which are typically long range in scope. *Second*, the court has created a virtually *per se* rule that an EIS will never be required any time a state water project plan is outside the planning horizon of a federal agency's competing project. *Third*, the court has drawn a distinction between existing and proposed water projects that finds no support in NEPA's provisions. And, *fourth*, the court's decision conflicts, or, at least, is in tension, with a decision of the Tenth Circuit that disagrees with the reasoning that the designation of a critical habitat boundary amounts to inaction that fails to trigger NEPA requirements. *See Catron County Bd. of Comm'rs* v. *U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436-38 (CA10 1996). *See also* S. CT. R. 10(a).

Further, the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. *See* S. CT. R. 10(c). This case marks the second time that a similar issue has been decided by the Fifth Circuit; but, now, there is disagreement between the Fifth and Tenth Circuits that was not present initially. *Compare Sabine River Auth.* v. *U.S. Dep't of Interior*, 951 F.2d 669 (CA5 1992), *and City of Dallas* v. *Hall*, 562 F.3d 712 (CA5 2009), *with Catron County*, 75 F.3d, at 1429. Finally, granting review will serve the salutary purpose of

ensuring that NEPA's requirements are properly applied to future federal actions that affect a State's water supply.

The Court should grant TWDB's petition for certiorari.

OPINIONS AND ORDERS BELOW

The Court of Appeals's opinion is reported as *City of Dallas* v. *Hall*, 562 F.3d 712 (CA5 2009) (TWDB App'x 78-97). The District Court's memorandum opinion and order disposing of the parties' cross-motions for partial summary judgment can be found at *City of Dallas* v. *Hall*, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2008 WL 2622809 (N.D. Tex. June 30, 2008) (TWDB App'x 34-71). The District Court rendered a partial final judgment and, then, an amended partial final judgment on the parties' cross-motions. 10.USCA5.4640-41, 53-55 (TWDB App'x 72-77). The relevant administrative orders are at 1.USCA5.334-438, .96-97, .98-103 & .131.

JURISDICTION

The Court of Appeals's judgment was entered on March 12, 2009. TWDB App'x 97. No petition for panel rehearing or rehearing *en banc* was filed. This Court has jurisdiction to review a petition for writ of certiorari on the judgment in question under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute at issue, NEPA § 102(C), 42 U.S.C. § 4332(C), requires federal agencies to

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the

> human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Several regulations are at issue as well, including: 40 C.F.R. §§ 1506.2(b) & 1508.8, .18, .27. Because of their length, they are reproduced in TWDB's Appendix at pages 104-10. *See* S. CT. R. 14(f).

STATEMENT OF THE CASE

I. BACKGROUND

A. The City

The City of Dallas, Texas is located in the north-east-central part of the State. Dallas is one of the State's largest cities, with a population of over 1.2 million people.[9] Since 2000, the population of the Dallas metropolitan area has increased 12 percent, making it the third fastest-growing metropolitan area in the U.S.; and the area is

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9. TEXAS ALMANAC 8, 264 (2008-09).

expected to double in size over the next 40 years.[10] The City's water department serves approximately 2.3 million people in the Dallas metropolitan area.[11] Since 2005, the City has been experiencing drought conditions, the likes of which have not been seen since the worst drought in recorded Texas history in the 1950s.[12] In recent years, the drought conditions grew so bad that approximately 32 percent of the City's water supply was depleted by January 2007.[13] Recent water shortages have served as a reminder of how important it is for the City and the State to plan for the future consumptive water needs of the Dallas metropolitan area.[14]

B. The Reservoir

A major plank in state, local, and regional plans to develop and provide a sufficient water supply for the Dallas metropolitan area is, and has been for some time, the creation of the Fastrill Reservoir along the Upper Neches River.[15] The Fastrill Reservoir site was first identified by the Upper Neches River Municipal Water

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10. 5.USCA5.2299, at ¶20.

11. 5.USCA5.2298, at ¶17.

12. 5.USCA5.2298-99, at ¶19; *see also In re Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 441 (Tex. 1982) (noting that "Texas' longest sustained recorded period of drought was between 1950 and 1957").

13. 5.USCA5.2299, at ¶19.

14. 5.USCA5.2298, at ¶18.

15. 5.USCA5.2298, at ¶¶13-16; 5.USCA5.2343-44, at ¶¶22-23.

Authority (UNRMWA) as a potential major reservoir in 1961.[16] Since then, the proposed reservoir has been part of several long-range, state and regional water planning strategies.[17] The State's 1984 Water Plan, for example, proposed the "Weches Reservoir",[18] a lake with a footprint that substantially overlapped the current Fastrill site.[19]

Then, in 1997, the Texas Legislature enacted a comprehensive water resource planning, management, and development bill, Senate Bill 1 (SB1),[20] which instituted a mandatory water planning process whereby TWDB and local and regional water planning authorities would submit water plans every five years.[21] The State's current water planning process is geared toward "assur[ing] an adequate supply of water to meet all anticipated economic needs of the State for the next 50

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16. 5.USCA5.2343, at ¶23; 8.USCA5.3859, .3860; 1.TWDB.3, .56.

17. *See supra* note 6.

18. "It was first called the Weches Reservoir proposal, but is now the Fastrill Reservoir proposal." 1.USCA5.348.

19. 2.TWDB.56.

20. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in scattered sections of Tex. Water Code Ann., Tex. Gov't Code Ann., Tex. Agric. Code Ann., Tex. Tax Code Ann., and Tex. Health & Safety Code Ann.).

21. *See* TEX. WATER CODE §§ 16.051, .053, .054. In the 40 years prior to the enactment of SB1, six state water plans were submitted to the Texas Legislature, but none passed. Martin Hubert & Bob Bullock, *Senate Bill 1, the First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH LAW REV. 53, 53 (1999).

years."[22] Under SB1, the regional planning authority for east Texas (Region I) issued a plan that identified the proposed Fastrill Reservoir site "as containing features which make [it] desirable for reservoir construction."[23] The 2002 State Water Plan incorporated Region I's recommendation.[24]

In 2006, the Region I Water Plan again proposed Fastrill Reservoir for construction,[25] as did Region C.[26] The Region C plan reported that the proposed Fastrill Reservoir has the potential to supply more than 112,000 acre-feet of water per year to Dallas's water department.[27] Region I's plan noted that the proposed Fastrill Reservoir could benefit "water user groups" in both Dallas and east Texas.[28] And the Region C plan anticipated that without developing new water sources, the region could face water shortages over the next 55 years that would have significant socioeconomic effects by the year 2060,

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22. 3.TWDB.76; *see also* Tex. Water Dev. Bd, *Water for Texas 2002*, 2002 STATE WATER PLAN 12, *at* http://www.twdb.state.tx.us/publications/reports/State_Water_Plan/2002/FinalWaterPlan2002.asp.

23. 4.TWDB.118, .123.

24. 2002 STATE WATER PLAN vi, 140.

25. 5.TWDB.218.

26. 8.TWDB.354 55. The City of Dallas falls within Region C's jurisdiction. 8.TWDB.261.

27. 8.TWDB.355.

28. 5.TWDB.218.

requiring the City to tap into Fastrill Reservoir.[29] The 2007 State Water Plan incorporates the regional planning groups' findings concerning Fastrill Reservoir.[30]

C. The Refuge

More than two decades after the 1961 UNRMWA study that identified Lake Fastrill as a potential major reservoir site, FWS identified the same area as a possible wildlife refuge site to provide a wintering habitat for migrating waterfowl.[31] In 1988, the FWS proposed that the site be acquired.[32] A draft EA was prepared noting that the proposal "could affect a potential water development project in the area" identified in the 1984 State Water Plan.[33] The EA was never finalized and no action was taken, however, largely because of a lack of funding.[34]

In the early 2000s, the refuge proposal was renewed.[35] Despite FWS's knowledge that the proposal would conflict with the State's plans for Fastrill Reservoir and create an

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29. 8.TWDB.280-81.

30. Tex. Water Dev. Bd, *Water for Texas 2007*, 2007 STATE WATER PLAN 266, 268, *at* http://www.twdb.state.tx.us.

31. 7.USCA5.3468, .3474-75, .3490.

32. 8.USCA5.3501-09.

33. 1.AR.53, .61.

34. 2A.AR.461-62; 7A.AR.2571.

35. 2A.AR.631; 7A.AR.2571.

"immediate flashpoint",[36] preparation of another EA was begun.[37] Throughout the process, FWS was reminded of the importance of Fastrill Reservoir to the State's and Dallas's water planning and development strategies.[38] FWS's immediate reaction to these plans, however, was that Lake Fastrill was not an "imminently proposed" reservoir but only a "possible project in the long term future"; therefore, FWS continued to move forward on its refuge proposal.[39]

In 2005, FWS released a draft EA proposal to establish an "acquisition boundary" for a refuge and acquire up to 25,281 acres of land within that boundary.[40] As part of this proposal, FWS considered three alternatives regarding the site: a "no-action" or "non-establishment of refuge" alternative;[41] an acquisition boundary that would include up to 15,294 acres;[42] and the acquisition boundary for 25,281 acres that was ultimately chosen.[43] No other alternative—such as developing a site in another location—was considered. FWS's EA referenced, only in

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36. 1.AR.193.

37. 2A.AR.461-62.

38. 2A.AR.574, .608, .611, .622, .631, .668.

39. 2A.AR.622, .631.

40. 1.USCA5.334, .338.

41. 1.USCA5.344.

42. *Id.*

43. 1.USCA5.344-45.

passing, the opposing interest in the proposed refuge site "as an area with the potential for development as a reservoir to act as a water supply for the Dallas metroplex."[44] Notwithstanding this competing interest, the EA did not analyze any impact or effects that the proposal would have on the State's and the City's water supply plans "[b]ecause the Service consider[ed] th[e] [Fastrill Reservoir] project far beyond the planning horizon for the refuge proposal," and it claimed that to do any more would involve nothing more than "speculat[ion] as to how the two projects would interface."[45]

Pursuant to the EA, FWS issued a finding of no significant impact, or FONSI, which determined that "no significant impact would be incurred to the human environment within the meaning of [§ 4332(C)] of the [NEPA]" by designating the proposed refuge site, and, thus, concluded that no EIS was required.[46] Regarding the plans for Fastrill Reservoir, FWS stated that it "consider[ed] any reservoir project speculative in the short term," "not definitive in scope or purpose," and "far beyond the planning horizon for the refuge proposal (i.e. 20 years)".[47] Based on these premises, FWS concluded that it could not "formally evaluate combined or cumulative

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44. 1 USCA5 355.

45. *Id.*

46. 1 USCA5 102.

47. *Id.*

impacts or details of how the two projects might interface while not attenuating the mutual goals of each project."[48]

In June 2006, the Director of FWS approved the proposal to create the NRNWR and thereby formally established the Refuge's acquisition boundary.[49] Approximately two months later, FWS accepted a one-acre conservation easement from a landowner within the acquisition boundary.[50] With that action, "federal sovereignty . . . prevent[ed] the building of a reservoir overlaying the refuge",[51] and it would now literally take an act of Congress to divest FWS of any lands within the Refuge.[52] The Refuge's creation, therefore, has effectively foreclosed Fastrill Reservoir as a water resource for the Dallas metroplex.

II. PROCEDURAL HISTORY

A. District Court

Following the Refuge's creation, the City of Dallas and TWDB (collectively, Plaintiffs) each filed lawsuits in different federal district courts,[53] which were later consolidated as one action in the Northern District of

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48. *Id.*

49. 1.USCA5.131.

50. 1.USCA5.451-64.

51. 2A.AR.622

52. 1.USCA5.102.

53. 1.USCA5.28-51; 10.USCA5.4-28.

Texas.[54] The City and TWDB each claimed, among other things, that FWS, the Department of the Interior, and their respective directors and officials (collectively, Defendants) violated NEPA by providing an inadequate EA and not performing an EIS.[55] Plaintiffs each sought declaratory and injunctive relief and requested that the FONSI be rescinded and that FWS be ordered to prepare an EIS in compliance with NEPA.[56] In lieu of asking the District Court for the entry of an order granting temporary injunctive relief, the parties agreed to a series of standstill agreements that were renewed periodically and precluded both sides from taking actions that would either further establish or frustrate the establishment of the Refuge until such time as the case was resolved.[57]

After the court dismissed certain other non-NEPA claims of Plaintiffs,[58] both sides filed cross-motions for partial summary judgment on the NEPA claims.[59] The District Court denied Plaintiffs' motions and granted

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54. 10.USCA5.138-39.

55. 1.USCA5.211, .229-37; 2.USCA5.487-91.

56. 1.USCA5.247-48; 2.USCA5.495-97.

57. 1.USCA5.194, .201; 4.USCA5.1891; 5.USCA5.2080, .2226, .2231; 9.USCA5.4404, .4415; 10.USCA5.4579, .4619, .4624.

58. *City of Dallas* v. *Hall*, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2007 WL 3125311, at *1, *15 (N.D. Tex. Oct. 24, 2007) (TWDB App'x 1, 31-2).

59. 6.USCA5.2575-2681, .2682-85, .2686-2999; 7.USCA5.3000-18, .3145-47, .3200-54, .3395-458.

Defendants' motions.[60] Relying heavily on *Sabine River Authority,* the District Court held *inter alia* that NEPA did not require FWS to prepare an EIS addressing the direct effects on the environment because "[e]stablishment of the Refuge boundary will not result in a change to the physical environment and in fact, preserves the land at issue."[61] Moreover, the court said that no EIS addressing the Refuge's indirect effects on the environment was required because the "[e]stablishment of the Refuge boundaries today cannot be said to be the legal and proximate cause of deficiencies in the City's water supply fifty years from now."[62] Regarding the adequacy of FWS's EA, the court found that the Service considered a reasonable range of alternatives in its EA,[63] properly evaluated the information at hand,[64] and acted reasonably in its dealings with city and state officials.[65]

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60. *City of Dallas* v. *Hall,* Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2008 WL 2622809, at *1, *16 (N.D. Tex. June 30, 2008) (TWDB App'x 34, 71).

61. *Id.*, at *6 (TWDB App'x 46).

62. *Id.*, at *7 (TWDB App'x 50).

63. *Id.*, at *9-11 (TWDB App'x 55-63).

64. *Id.*, at *12-13 (TWDB App'x 63-64).

65. *Id.*, at *13-16 (TWDB App'x 64-70).

Judgment was entered,[66] and Plaintiffs appealed.[67] The District Court also entered an injunction pending appeal that continued the parties' standstill agreement until further order of the court or the Fifth Circuit.[68]

B. Fifth Circuit

The Fifth Circuit affirmed.[69] The court agreed with the District Court that the EA's discussion of only three alternative proposals for the Refuge site was reasonable in light of the Service's FONSI.[70] Additionally, the court stated that FWS need not consider any alternatives besides the ones presented in the EA because: (1) the City's and the State's plans for building Fastrill Reservoir were speculative, indefinite, and too far beyond FWS's 20-year planning horizon for the Refuge,[71] and (2) other proposed alternatives for building Fastrill Reservoir at the Refuge site would displace the wintering habitat of migratory waterfowl.[72]

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66. TWDB App'x 72, 75 (10.USCA5.4640-41, .4653-55).

67. 10.USCA5.4656.

68. 10.USCA5.4634-39.

69. *City of Dallas* v. *Hall*, 562 F.3d 712, 715, 724 (CA5 2009) (TWDB App'x 78-79, 97).

70. *Id.*, at 719 (TWDB App'x 86-87).

71. *Id.*, at 718 (TWDB App'x 86).

72. *Id.* (TWDB App'x 90).

The court also agreed that the EA sufficiently analyzed both the direct and indirect effects of establishing the Refuge.[73] The question was whether "an agency must account for the effects on a municipal water supply of precluding a proposed but-as-yet-nonexistent water source."[74] The court answered that question no, distinguishing between agency actions that affect "*existing* water sources", which would require such an analysis, and those agency actions that would affect "proposed water sources", which would not.[75] The court further determined that "the effects of establishing the [R]efuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas."[76] The court noted that besides the mention of Lake Fastrill in state, regional, and local planning documents, no firm commitment or "concrete steps" had been taken to establish the reservoir.[77] The court concluded that the uncertainty about, and long time frame for, the reservoir project obviated the need for any in-depth discussion of the reservoir and the impacts that the Refuge would have on municipal water supplies and the State's water plan.[78]

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73. *Id.*, at 719-20 (TWDB App'x 87-89).

74. *Id.*, at 719 (TWDB App'x 88).

75. *Id.* (TWDB App'x 87) (emphasis in original).

76. *Id.* (TWDB App'x 88).

77. *Id.*

78. *Id.* (TWDB App'x 88-89).

Finally, concerning FWS's nonperformance of an EIS, the Fifth Circuit, like the District Court, relied heavily on *Sabine River Authority* in determining that no EIS was required.[79] The Fifth Circuit identified three factors from *Sabine River Authority* for determining whether an EIS is required: "whether the agency action (1) precludes any development of the land, (2) changes the character or function of the land, and (3) prohibits any change in the *status quo* of the land."[80] Applying these factors, the court held that no EIS was required because the agency action only involved setting an acquisition boundary for a wildlife refuge and accepting a conservation easement.[81]

This petition for certiorari followed.

ARGUMENT

I. SUMMARY OF ARGUMENT

Water is Texas's "most precious natural resource and basic economic commodity", and "[w]ater, more than any other natural resource, will determine Texas' future in the decades to come." Tex. Water Dev. Bd., *Water for Texas 1997*, 1997 STATE WATER PLAN 1-1, *at* http://www.twdb.state.tx.us/publications/reports/State_Water_Plan/1997/Ch_1.pdf. Accordingly, state officials, in conjunction with local and regional authorities, are charged with the responsibility of producing a state water plan that addresses the broad public interests of the State. *See* TEX.

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79. *Id.*, at 721 (TWDB App'x 91-92).

80. *Id.* (TWDB App'x 92).

81. *Id.*, at 723 (TWDB App'x 95-96).

WATER CODE §§ 16.051, .053, .054. The state water planning process attempts to answer several fundamental questions about the State's water supply: "How much water does Texas have? Is there enough for the people, the economy, and the environment? Will there be enough for future generations? Where are the supplies? Can they be made available for use at affordable costs? Will they be safe to drink and to use in other ways?" 1997 STATE WATER PLAN, at 1-2. The State's water plan "provides a statewide perspective that places local and regional needs in a broader context." *Id.* Ultimately, the "*goal of the State Water Plan is to identify those policies and actions that may be needed to meet Texas' near- and long-term water needs, based on a reasonable projected use of water, affordable water supply availability, and a goal of conservation of the State's natural resources.*" *Id.*, at 1-3 (italics in original).

FWS's decision to establish the Refuge largely overlooked these important state interests. Specifically, the Service took an unnecessarily myopic view of the State's plans for developing Fastrill Reservoir to provide a water supply for the Dallas metropolitan area and others. FWS's lack of consideration of Fastrill Reservoir is evident in the Service's decision not to perform an EIS pursuant to NEPA's mandates. NEPA requires the performance of an EIS because it was reasonably foreseeable that the refuge determination would significantly affect the quality of the human environment by causing indirect socioeconomic and environmental effects for the City and the State. FWS's decision therefore was erroneous and resulted from action that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

FWS's proffered reasons for avoiding the EIS requirement do not excuse its nonperformance. The fact that the state water planning process exceeded the planning horizon for the refuge proposal in this case does not foreclose an EIS. The planning horizon chosen by FWS was arbitrarily short considering the realities of state, local, and regional water planning processes. Nor does the fact that Lake Fastrill was a proposed reservoir, and not an existing one, obviate the EIS requirement. Finally, the designation of a refuge boundary and acceptance of a conservation easement by the FWS is major federal action; it is not, as the Fifth Circuit characterized it, "inaction" that excuses the nonperformance of an EIS. On this latter point, there is an apparent conflict between the Tenth Circuit, on the one hand, and the Ninth and Fifth Circuits, on the other.

For these reasons, the Court should grant the State's petition for a writ of certiorari.

II. BRIEF OVERVIEW OF NEPA

Congress passed NEPA "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Lands Council* v. *Powell*, 395 F.3d 1019, 1026 (CA9 2005). The preparation of an EIS is NEPA's "core requirement." *Winter* v. *Natural Res. Def. Council*, 129 S. Ct. 365, 389 (2008) (Ginsburg, J., dissenting) (citing *Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 757 (2004)). NEPA requires any federal agency proposing a "major Federal action[] significantly affecting the quality of the human environment" to prepare an EIS, detailing the environmental impact of the action;

unavoidable adverse environmental effects; alternatives to the action; relationship between the short-term uses and long-term productivity of the affected environment; and irretrievable and irreversible commitments of resources should the action be implemented. 42 U.S.C. § 4332(C)(i)-(iv). By authorizing an EIS, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Because federal agencies must comply with the Act "to the fullest extent possible", 42 U.S.C. § 4332, NEPA and its EIS requirement "are broadly applied." *See Catron County Bd. of Comm'rs* v. *U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (CA10 1996).

Under applicable administrative regulations relating to an EIS, "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The term "effects" is defined to "include: (a) Direct effects, which are caused by the action and occur at the same time and place," and "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.*, § 1508.8. To determine whether § 4332(C) requires consideration of a particular effect, "the relationship between that effect and the change in the physical environment caused by the major action at issue" must be examined. *Metro. Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 773 (1983). There must be "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Pub. Citizen*, 541 U.S., at 763 (quoting *Metro. Edison Co.*,

460 U.S., at 774). This requirement is analogous to the "'familiar doctrine of proximate cause from tort law.'" *Id.* "The threshold for arriving at a 'major federal action' requiring preparation of an EIS is generally low." *Davis* v. *Morton*, 469 F.2d 593, 597 (CA10 1972).

NEPA also requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). This "alternatives provision" applies regardless of whether the agency is performing an EIS or an EA, and mandates that full and meaningful consideration be given to all reasonable alternatives. *N. Idaho Cmty. Action Network* v. *U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (CA9 2008). Whereas an EA is only required to include a brief discussion of reasonable alternatives, 40 C.F.R. § 1508.9(b), an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives," *id.*, § 1502.14(a).

An agency is not required to prepare a full EIS, however, if it performs a shorter EA and determines that the proposed action will not have a significant impact on the environment. 40 C.F.R. §§ 1501.3, .4; 1508.9, .13, .27; *Winter*, 129 S. Ct., at 372. A determination that an EIS is not needed results in a FONSI. 40 C.F.R. §§ 1501.4(e), 1508.9, .13. If a FONSI is issued, "no further study of the environmental consequences which would ordinarily be explored through an EIS" is required. *Sabine River Auth.*, 951 F.2d, at 677.

III. STANDARD OF REVIEW

In the NEPA context, the role of the courts is to ensure that the federal agency takes a "hard look" at the environmental consequences of its actions. *See Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). A court will set aside an agency's decision not to prepare an EIS if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Pub. Citizen*, 541 U.S., at 763.

IV. THE DECISION NOT TO REQUIRE AN EIS WAS ERRONEOUS, ARBITRARY AND CAPRICIOUS, AND IT MERITS CONSIDERATION BY THIS COURT.

A. The Refuge Proposal Has Reasonably Foreseeable Indirect Effects, Requiring Preparation of an EIS.

An EIS needs to be prepared in order to consider the reasonably foreseeable and significant indirect effects that establishing the Refuge will have on the quality of the human environment affecting the State and the City. *See* 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.8(b), .18, .27. FWS determined, however, that no EIS was required under NEPA. Rather, FWS issued an EA and a FONSI, neither of which adequately addresses the indirect environmental impacts that the Refuge proposal might have on the City, the region, and the State. *See* 1.USCA5.100-02, .348, .355, .364, .368. An EIS of the indirect impacts would help "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken", and "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R.

§ 1500.1(b), (c). FWS's decision not to prepare an EIS was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the NEPA, and should be reversed. *See* 5 U.S.C. § 706(2)(A).

NEPA mandates that federal agencies consider both direct *and indirect* effects. 40 C.F.R. § 1508.8. But contrary to NEPA's requirements, FWS considered only local and direct consequences, that is, near-term, direct environmental impacts, on the land and environment in the vicinity of the proposed Refuge. *See* 1.USCA5.98-102, .334-81. This was insufficient. There were reasonably foreseeable indirect impacts that also demanded consideration. 40 C.F.R. §§ 1508.8(b), .18. In dismissing these indirect effects as not reasonably foreseeable, FWS and the lower courts misconstrued and misapplied NEPA's statutory and regulatory provisions.

Under NEPA, indirect effects are "later in time" or "farther removed in distance" than direct effects. *See id.*, § 1508.8(b). They include effects on "natural resources" and "ecosystems", and on things that have "aesthetic, historic, cultural, economic, social, or health" value. *See id.* To be considered, they must be: (1) caused by the federal action, (2) reasonably foreseeable, and (3) significant in terms of both context and intensity. *See id.*, §§ 1508.8(b), .27. The indirect effects at issue here—which are later in time and farther removed in distance—satisfy these requirements.

For starters, the indirect effects, or impacts, on the human environment at issue undeniably involve natural resources and ecosystems, as a future water resource for the Dallas metroplex and east Texas is being eliminated. If Lake Fastrill is not developed, then other water

resources will have to be developed and used, and the concomitant impacts of resorting to those other sources of water, along with the nondevelopment of Lake Fastrill, will be brought into play. The nondevelopment of Fastrill Reservoir will almost certainly have a domino effect with ecological, social, and economic consequences for the City of Dallas, the north and east Texas regions, and the State. The Dallas metroplex, with its rapidly increasing population and unsated thirst for water, will have to get another water source from somewhere. Replacing Fastrill Reservoir with another water source will inevitably cause environmental and socioeconomic effects that could be more significant than Lake Fastrill's. No one seriously doubts this.

Nor is it doubtful that the impacts will be significant. In terms of context, 40 C.F.R. § 1508.27(a), the decision to establish the Refuge admittedly "prevent[s] the development of the Fastrill Reservoir because federal lands cannot be subjugated by any local or state project." 1.USCA5.364. This affects a major metropolitan area and its water supply. In terms of intensity, 40 C.F.R. § 1508.27(b), the tussle over the creation of the Refuge has been "highly controversial." *See, e.g.*, 1.AR.61, .193; 2A.AR.458, .471, .476, .535-36, .537, .580-81, .611, .631, .668. Further, a community's water supply obviously affects "public health and safety"; that needs no elaboration. 40 C.F.R. § 1508.27(b)(2), (4).

Evidence of these indirect effects can be found in the 2006 Region C Water Plan. The planning authority evaluated "potentially feasible water management strategies" for the region, including the City of Dallas. *See* 8.TWDB.337-60. The strategies "were evaluated on the

basis of quantity, reliability, cost, environmental factors, impacts on agricultural and rural areas, impacts on natural resources, impacts on other water management strategies and third party impacts, impacts to key water parameters, consistency with plans of region C water suppliers, and consistency with the plans of other regions." 8.TWDB.337. The authority's findings are summarized in a table and bar chart. TWDB App'x 98-102 (8.TWDB.340-44). The bar chart, in particular, depicts the unit costs of choosing one water management strategy over another, *i.e.*, developing Lake Fastrill as opposed to another water source. TWDB App'x 102 (8.TWDB.344).

Most significantly, the Region C Water Plan shows how, if Lake Fastrill is taken out of the equation, water users in that region will have incentive to fully develop other water resources. Developing those other water resources will have environmental consequences of their own. For example, a couple of alternative water resources to Lake Fastrill are the George Parkhouse Lakes (North and South) in the Sulphur River Basin. 8.TWDB.338-39, .341-42, .344., .354-55. The George Parkhouse Lakes are described as "alternative strateg[ies]" for the City, whereas Fastrill Reservoir is the "recommended" strategy for the City. 8.TWDB.354, .354-55, .355. The Region C Water Plan estimates the relative degree of impact—"Environmental Factors", "Agricultural/Rural Impacts", "Other Natural Resources", and "3rd Party Impacts"—that will result from the development of Lake Fastrill and the George Parkhouse Lakes—as well as other water sources. TWDB App'x 98, 99-100 (8.TWDB.340, .341-42). The impacts of developing the George Parkhouse Lakes and Lake Fastrill range in degree from "medium" to "high," and the degree of impacts

of the George Parkhouse Lakes, in some respects, are the same as or higher than Lake Fastrill. *See id.* As the plan shows, therefore, developing an alternative water resource instead of Lake Fastrill will have its own environmental consequences, some of which may be greater than Lake Fastrill. *See id.*, at 98-101 (8.TWDB.340-44). FWS never considered these potential impacts, however, because it never took a "hard look" at the alternatives to Lake Fastrill and their consequences as reflected in the state water plans. NEPA required at least this much.

The reason FWS and the lower courts gave for overlooking these predicted and predictable indirect economic and environmental effects was that they were not reasonably foreseeable and could not be considered a proximate cause of the Refuge decision. *See* 1.USCA5.100-02, .348, .355, .364, .368; *City of Dallas*, 562 F.3d, at 719 (TWDB App'x 88); *City of Dallas*, 2008 WL 2622809, at *7 (TWDB App'x 47-48). But that is simply not true. An impact is reasonably foreseeable if it is "'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" *City of Shoreacres* v. *Waterworth*, 420 F.3d 440, 453 (CA5 2005) (quoting *Sierra Club* v. *Marsh*, 976 F.2d 763, 767 (CA1 1992)). It's not as though FWS were being asked to "ferret out every possible alternative" and impact, no matter "how uncommon or unknown" they might be. *See Vt. Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Prudent state planners had already foreseen the potential impacts that FWS is claiming are unforeseeable. The potential indirect effects were knowable by FWS when it made the final Refuge determination in 2006, because the 2006 Region C Water Plan had been issued and

approved by the State before that date. *See* 8.TWDB.268-69, .518, .523-24; 10.TWDB.544; 1.USCA5.131.

What's more, NEPA regulations require federal agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements," by employing, among other things, "joint planning processes" and "joint environmental research and studies". 40 C.F.R. § 1506.2(b); *see also* 42 U.S.C. § 4331(a). FWS did none of this. In fact, it deliberately worked to advance the refuge project to the detriment of the Fastrill project. *See, e.g.*, 2A.AR.459, .537, .611, .631; 6.AR.2029, .2191. Especially in this case, where the water supply of one of the State's largest metropolitan areas is at stake, a joint effort and cooperation between state and federal governments was essential—not only under federal statutory and regulatory law, but under principles of federalism and comity as well. *Cf. California* v. *United States*, 438 U.S. 645, 678 (1978) (federalism principles require respect for the "interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control").

It was arbitrary, capricious, and an abuse of discretion for FWS to ignore the indirect effects of its decision and not perform an EIS. Accordingly, the decision should be reversed.

B. The 30-year Difference Between Lake Fastrill's Planning Horizon and That of the Refuge Did Not Obviate the EIS Requirement.

TWDB's argument that an EIS should have been done was rejected largely because FWS deemed the Fastrill

Reservoir plans to be too "far beyond the planning horizon for the refuge proposal (i.e. 20 years)" and because the Fastrill project had a "long time frame" for completion. *City of Dallas*, 562 F.3d, at 718, 719 (TWDB App'x 86, 88). In other words, the 50-year planning horizon for Lake Fastrill was declared to be incompatible with, and too long for, FWS's 20-year plans, and the EIS requirement was therefore excused.

But this decision is not consistent with NEPA's purpose and policy. NEPA's stated purpose is to "foster excellent action" and the "process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). NEPA also requires federal agencies "to the fullest extent possible . . . [i]mplement procedures to . . . emphasize real environmental issues and alternatives . . . . [and] [u]se all practicable means . . . [to] avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." *Id.*, § 1500.2(b), (f). FWS's decision frustrates—not furthers—these interests.

In effect, FWS avoided NEPA's EIS requirement by simply adopting a shorter planning horizon than the state and local authorities, knowing full well that state plans were already in the works that conflicted with the Service's plans. This *ex post facto* determination, with the lower courts' approval, has created a virtually *per se* rule that a federal project with a shorter planning horizon trumps a state project with a longer one, and will therefore excuse an agency's performance of an EIS under NEPA. Stated simply, a long-range state plan for natural

resources will not receive EIS consideration under NEPA whenever a competing federal proposal concerning the same natural resources is shorter than the state plan.

There is no basis in law or policy, however, for such a *per se* rule. Nor is it reasonable to ignore state and local water planning efforts just because a federal plan has a shorter time frame. By way of comparison, FWS itself has used a 50-year planning horizon in other cases. *See* S. Bay Salt Pond Restoration Project, EIS, 72 Fed. Reg. 71937, 71938 (Dec. 19, 2007). The U.S. Forest Service has used a 150-year planning horizon regarding forest uses. *See* Malheur Nat'l Forest Timber Mgmt. Plan, *at* http://www.fs.fed.us/r6/malheur/projects/forest-plan-2000/rod/. And the EPA has used a 10,000-year planning horizon for nuclear waste disposal. *See Nuclear Energy Inst.* v. *EPA*, 373 F.3d 1251, 1315 (DC 2004). A national wildlife refuge like this one is designed to last essentially forever; it cannot be terminated except by an act of Congress or extraordinary administrative procedure. *See* 16 U.S.C. § 668dd(a)(3). The permanence of the refuge designation makes the decision to limit the planning horizon to 20 years especially arbitrary. Given the significant interests at stake, there is no valid reason why 20 years is superior to 50 years for planning purposes. Moreover, a 20-year horizon when considering the direct effects of the Refuge designation—effects on the ecosystem within the Refuge—has no logical connection to the indirect socioeconomic effects on the region.

Accordingly, FWS's decision not to prepare an EIS because of an arbitrarily shortened federal planning horizon should be reversed, and any hint of a *per se* rule

that always favors a shorter planning period should be expunged.

C. The Fact That Lake Fastrill Was Not Yet in Existence Did Not Obviate the EIS Requirement.

A further reason given for avoiding the EIS requirement was that Fastrill Reservoir was only a "proposed water source[]", not an "existing" one. *City of Dallas*, 562 F.3d, at 719 (TWDB App'x 87); *see also id.*, at 722 (TWDB App'x 93-94) (stating that DOI regulations require an EIS only "when there is a conflict with 'existing' State and local land or where there is 'significant controversy' over environmental effects"). Without citing any case, the Fifth Circuit declared that an agency need not "account for the effects on a municipal water supply of precluding a proposed but-as-yet-nonexistent water source." *Id.*, at 719 (TWDB App'x 88). But NEPA draws no such distinction.

This conclusion—that the designation of a refuge boundary will have significant effects on the human environment only if that boundary interferes with an existing water source as opposed to a proposed one—is based on a logical fallacy. The refuge boundary, by virtue of its designation, has virtually forever foreclosed the option of establishing Fastrill Reservoir on refuge lands. The record amply demonstrates it is reasonably foreseeable that not developing Lake Fastrill will have significant indirect effects on the City and the State. *See supra* part IV(A). So it cannot be true that FWS's decision lacks any indirect environmental consequences for the human environment.

Thus, the decision not to require performance of an EIS on the grounds that the Fastril[1] Reservoir was not yet in existence should be reversed.

D. The Fifth Circuit's Decision That No EIS Was Required Because the Refuge Designation Made No Change to the Environmental *Status Quo* Conflicts with a Decision of the Tenth Circuit on the Same Important Matter.

The Fifth Circuit also concluded that because "the present federal action will have no significant physical effects", no EIS was required. *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 93-94). The court reasoned that "the action at issue here is the establishment of an acquisition boundary" and "that boundary does not effect any change in the physical environment, but merely authorizes the purchase of property from willing buyers or the acceptance of conservation easements." *Id.* The court further stated that "acceptance of a negative, non-development easement was 'tantamount to inaction'" and therefore "not a 'major Federal action[] significantly affecting the quality of the human environment" that would require an EIS under NEPA. *Id.* (quoting *Sabine River Auth.*, 951 F.2d, at 680). In other words, according to the court, establishment of a refuge boundary and acceptance of a conservation easement is not a major federal action requiring an EIS, but, rather, is inaction that escapes NEPA's triggering mechanism.

That view, however, is myopic. Logically, the designation of a refuge boundary can hardly be deemed "inaction" that has absolutely no environmental impact and only beneficial effects. It is facile to suggest that the boundary designation and acceptance of a conservation

easement can only be beneficial inaction. To the contrary, the boundary designation is indisputably an affirmative act taken by FWS, not inaction or an absence of action by FWS. Although it may be true that neither establishing the refuge boundary nor accepting the easement results in a change to the current physical environment of the land in question, it is equally true that future changes to the human environment will inevitably occur as result of the boundary designation and the land acquisition. As discussed in part IV(A) *supra*, the ripple effect of precluding Lake Fastrill will reverberate beyond the immediate vicinity and the present time. It will most assuredly impact the physical environment of humans in the Dallas metropolitan area and elsewhere. The Fifth Circuit's conclusion that FWS's actions do not trigger NEPA's EIS requirement is, quite simply, wrong.

Furthermore, that conclusion, and the reasoning that undergirds it, has been rejected by the Tenth Circuit in a strikingly similar case. *See Catron County*, 75 F.3d, at 1429. In *Catron County*, FWS designated 74 miles of river habitat in Catron County, New Mexico, as a "critical habitat" for the spikedace and loach minnow, threatened species under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. *See* 75 F.3d, at 1432. Seeking to force FWS to perform an EIS under NEPA, the County claimed "that designation of critical habitat would prevent the diversion and impoundment of water by the County," *id.*, at 1433, and "that the proposed designation [would] prevent continued governmental flood control efforts", *id.*, at 1437. The County therefore sued FWS, asserting violations of the APA, the ESA, and NEPA. *Id.*, at 1432-33. Finding that FWS had failed to comply with NEPA in designating critical habitat, the District Court granted the

County partial summary judgment and an injunction, and the Tenth Circuit affirmed. *Id.*, at 1433.

The threshold issue in that case was whether a federal actor "must comply with the documentation requirements of NEPA when designating critical habitat under the ESA". *Id.*, at 1435. Recognizing that the Ninth Circuit had already decided "the precise issue" facing the Tenth Circuit, *id.*, at 1436 (citing *Douglas County* v. *Babbitt*, 48 F.3d 1495 (CA9 1995)), the Court rejected the Ninth Circuit's holding that NEPA does not apply to critical habitat designations, and "disagreed with [the Ninth Circuit's] reasoning". *Id.* The Tenth Circuit disagreed with the determination "that no actual impact flows from the critical habitat designation", *id.*, and that federal agency action under the ESA was "immune" from "compliance with NEPA procedure", *id.*, at 1437. Most significantly, the Tenth Circuit rejected the notion that the designation of critical habitat does not effect any change to the physical environment and is inevitably beneficial, and, therefore, no EIS is required:

> "The designation of critical habitat effectively prohibits all subsequent federal or federally funded or directed actions likely to affect the habitat. . . . The short- and long-term effects of the proposed governmental action (and even the governmental action prohibited under ESA designation) are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful." *Id.* (citation omitted).

The court concluded that, if proven, the County's allegations that the proposed designation would prevent its water management efforts would require compliance

with NEPA's requirements and not just the ESA's provisions. *See id.*, at 1437-38.

The reasoning of the Tenth Circuit in *Catron County* squarely conflicts with the reasoning of the Ninth Circuit in *Douglas County*. The Ninth Circuit concluded that an EIS would not be required because the federal action of designating critical habitat did not alter the natural physical environment. *Douglas County*, 48 F.3d, at 1505. Reflecting on the purpose of NEPA, the court reasoned that neither an EA nor an EIS was required when an action was intended to conserve the environment. *Id.*

The Fifth Circuit apparently agrees with the Ninth Circuit and has adopted its reasoning instead of the Tenth Circuit's reasoning. Even before the present case, the Fifth Circuit in *Sabine River Authority* replicated the Ninth Circuit's reasoning in *Douglas County*. In *Sabine River Authority*, the Fifth Circuit found that an EIS was not necessary where FWS acquired a negative conservation easement for wetlands habitat, regardless of the fact that the easement would prevent the State from constructing a reservoir on the same land. *See* 951 F.2d, at 679. The court determined that merely accepting a negative easement was not a government undertaking that "changes the character or function of the land." *Id.*, at 680. According to the court, the mere acceptance of the easement by FWS actually amounted to "inaction", which did not trigger NEPA's EIS requirement. *Id.* That is, FWS's action simply did not "alter the status quo", nor did it result in a "change" to the physical environment. *Id.* The court reasoned: "NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built." *Id.*, at 679.

The Fifth Circuit followed that reasoning in this case:

> "As in *Sabine River*, where the acceptance of a negative, non-development easement was 'tantamount to inaction,' . . . setting an acquisition boundary for the refuge does not effect a change in the use or character of land or in the physical environment. Thus, it is not a 'major Federal action significantly affecting the quality of the human environment,' . . . and no EIS is necessary under the requirements of NEPA." *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 95-96) (citations omitted).

The Fifth Circuit's and Ninth Circuit's decisions conflict with the Tenth Circuit's decision "on the same important matter." *See* S. CT. R. 10(a). The Fifth Circuit and the Ninth Circuit obviously do not consider boundary designations and acceptances of conservation easements to trigger NEPA's action-forcing mechanism and EIS requirement. The Tenth Circuit, however, evidently disagrees. *See* Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Determination of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 1005-06 (1996) (discussing conflict between Ninth, Tenth, and Fifth Circuits concerning whether a habitat designation triggers EIS requirement under NEPA); *see also* Ben W. Alderton, Note, *Must NEPA Always Be Followed to the Letter When Obtaining an Environmental Assessment To Acquire a Conservation Easement? After All, Aren't We Maintaining the Environmental Status Quo?*, 19 J. NAT. RESOURCES & ENVTL. L. 193, 200-01 (2004-05) (describing question left open by *Sabine River Authority* as to whether a negative conservation easement triggers NEPA at all,

noting that the issue has arisen in the context of the designation of critical habitat under the ESA where the environmental *status quo* is maintained, and discussing *Douglas County* and *Catron County*).

Accordingly, the conflicting decisions of these federal courts of appeals "call for an exercise of this Court's supervisory power." *See* S. CT. R. 10(a). This Court should therefore grant this petition and resolve the conflict.

CONCLUSION

For these reasons, TWDB's petition for writ of certiorari should be granted.

Respectfully submitted,

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June 2009

APPENDIX

Supreme Court, U.S.
FILED

081524 JUN 10 2009

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

TEXAS WATER DEVELOPMENT BOARD,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.;
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
H. DALE HALL et al.,	§	CIVIL ACTION NO.
	§	
Defendants	§	3:07-CV-0060-P
	§	
	§	Consolidated with:
THE TEXAS WATER DEVELOPMENT BOARD,	§	
	§	Civil Action No.
Plaintiff	§	
	§	3:07-CV-0213-P
v.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are (1) the Federal Defendants' Motion to Dismiss Plaintiff City of Dallas' Eighth, Ninth,

Tenth, Eleventh, and Twelfth Claims for Relief, filed March 26, 2007; (2) the Federal Defendants' Motion to Dismiss Plaintiff Texas Water Development Board's Sixth and Seventh Claims for Relief, filed March 23, 2007; and (3) the Motion to Dismiss of Defendants James Yount and Annie Lyles Yount, filed April 12, 2007. After careful consideration of the Parties' briefing and the applicable law, the Court hereby GRANTS the Federal Defendants' Motion to Dismiss Plaintiff City of Dallas' Eighth, Ninth, Tenth, Eleventh, and Twelfth Claims for Relief and hereby DISMISSES with Prejudice Counts VIII, IX, X and XII of the City of Dallas's Complaint. Count XI is dismissed subject to the City filing an amended complaint within ten (10) days from the date of this order. Further, the Court hereby GRANTS the Federal Defendants' Motion to Dismiss Plaintiff Texas Water Development Board's Sixth and Seventh Claims for Relief and hereby DISMISSES with Prejudice Counts Six and Seven of the State's Complaint. The Court also GRANTS the Younts' Motion to Dismiss.[1]

BACKGROUND

The City of Dallas (the "City") and the Texas Water Development Board (the "State") (collectively, "Plaintiffs") have filed these consolidated lawsuits against the Federal

---

1 The Local Rules of this Court limit a party's briefing to twenty-five pages. (*See* Local Rule 7.2(c).) In an effort to circumvent this rule, the City of Dallas has put the majority of its legal citations in footnotes. By relegating virtually all its legal authority to single-spaced, ten-point font footnotes, the City of Dallas was able to avoid compliance with the Court's page limitation. In the future, the Court will not tolerate this improper overuse of footnotes.

Defendants[2] and James and Annie Yount seeking reversal of the United States Fish and Wildlife Service's ("FWS") decision to establish the Neches River National Wildlife Refuge ("Refuge") without preparing an Environmental Impact Statement or an adequate Environmental Assessment as required by the National Environmental Policy Act. Plaintiffs also ask the Court to declare the legal rights and relations among the Parties, to require FWS to comply with certain Executive Orders, to rescind a deed purporting to transfer a conservation easement into the Refuge, and to enjoin the acquisition of real property for the Refuge.

The National Wildlife Refuge System comprises various fish, wildlife, and waterfowl refuges administered by the Secretary of the Interior through FWS. On June 11, 2006, FWS designated a 25,281-acre site within Anderson and Cherokee counties, Texas as the Neches River National Wildlife Refuge. Plaintiffs allege that FWS's administrative decision to establish the Refuge was plagued with procedural flaws and statutory violations.

According to Plaintiffs, the City and the State have contemplated for decades development plans for a reservoir on the Upper Neches River to serve the future water needs of its residents and other customers. (City

---

2 The Federal Defendants include Defendant H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service, Dick Kempthorne, in his official capacity as the Secretary of the United States Department of the Interior, Benjamin N. Tuggle, in his official capacity as the Regional Director of the Southwest Region (Region 2) of the United States Fish and Wildlife Service, and the United States Department of the Interior.

Compl. ¶ 19; Sate Compl. ¶ 22.)[3] This proposed reservoir is known as the Fastrill Reservoir. (AR 1178.)[4] Yet despite knowing of the City and the State's interest in possibly utilizing the land for this purpose, the federal government established a Refuge on the same land in bad faith and without complying with the relevant statutory requirements.

I.

A brief overview of the statues and regulations creating the administrative framework, terminology, and policies helps to understand this case. After describing the bureaucratic order, the Court will turn to the factual and procedural background.

A. National Environmental Policy Act.

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-61 (1982), was established to ensure that federal agencies carefully consider the environmental impacts of their projects and that information about those impacts will be made available to the public. *See Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2004.) The act was intended to reduce or eliminate environmental damage and to promote the understanding of the ecological systems and natural resources important to the United Sates. *See id.* To that end, NEPA requires federal agencies to prepare a detailed Environmental

---

3 Plaintiff Texas Water Development Board ("TWDB") is an agency of the State of Texas that is authorized by the state to acquire and develop water storage facilities, including reservoirs.

4 References to the Administrative Record will be cited as "AR."

Impact Statement ("EIS") for all "major federal actions significantly [affecting] the quality of the human environment." 42 U.S.C. § 4332(C). NEPA itself does not mandate particular results, rather NEPA imposes procedural requirements on federal agencies, requiring them to analyze the environmental impact of their proposals and actions. *See Coliseum Square Assoc., Inc. v. Jackson*, 465 F.3d at 215, 223 (5th Cir. 2006.)

Under NEPA regulations, an agency undertaking an action is required to determine whether its proposal requires an EIS. 40 C.F.R. § 150.4(a). The agency will first prepare a more limited Environmental Assessment ("EA") to determine whether an EIS is required. *See* 40 C.F.R. § 1501.4(b). The EA is a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS. *See Coliseum Square*, 465 F.3d at 224 (citing 40 C.F.R. § 1508.9(a)). If the agency determines, based on the EA, that no EIS is needed because the action would not significantly affect the environment, it must issue a 'finding of no significant impact' ("FONSI"), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment. *See* 40 C.F.R. §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS.

An EIS must describe the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, and any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. *See* U.S.C. § 4332(2)(C).

B. National Wildlife Refuge System

The mission of the National Wildlife Refuge System is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." *See* 16 U.S.C. § 668dd(a)(2). The Secretary of the Interior is responsible for administering the system pursuant to the National Wildlife Refuge System Administration Act. *See id.* § 668dd(4).

C. Administrative Procedure Act.

The Unites States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states. *See California v. Arizona*, 440 U.S. 59, 61-62 (1979). In order to pursue their claims, Plaintiffs must establish that the United States has waived its immunity with respect to this lawsuit.

The Administrative Procedures Act ("APA") provides a waiver of sovereign immunity for actions based on federal agency decisions. The APA provides judicial review for final agency decisions when a person is adversely affected or aggrieved by agency action. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action . . . seeking relief other than money damages ... shall not be dismissed . . . on the ground that it is against the United States.") The waiver is limited. It does not "confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.*

The APA provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See id.* § 706(2)(A).

D. Executive Orders Nos. 13,132 and 13,352.

Executive Order No. 13,132 was signed by President Bill Clinton on August 4, 1999. The Executive Order addresses how federal agencies shall maintain the basic precepts of federalism when they formulate and implement federal policy. *See* Exec. Order No. 13,132, 64 Fed. Reg. 4,325 (Aug. 4, 1999). President George W. Bush signed Executive Order 13,352 on August 26, 2004, which was intended to promote cooperative conservation with respect to actions relating to the use, enhancement, and enjoyment of natural resources and/or protection of the environment and to promote collaborative activity among federal, state, and local officials. *See* Exec. Order 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

II.

The Court now turns to the factual and procedural history of this case.

A. Early History of the Land.

As early as 1961, the upper portion of the Neches River area was identified as a site for the potential Fastrill Reservoir. (State Compl. ¶ 23.) The State of Texas' 1984 Texas Water Plan identified a large portion of that same area for a water reservoir. (State Compl. ¶ 23.)

In 1985, FWS identified the same site as potentially deserving wildlife reserve protection. (AR 1964.) In 1988,

FWS approved a preliminary proposal to conduct additional planning for a refuge. Yet, because there was not enough money at the time to fund this research and planning, no action was taken.

Again in 1997, the State of Texas' Water Plan identified the Fastrill Reservoir as an "alternate water supply development site." (State Compl. ¶ 23.) And in 2001, the TWDB identified the Fastrill Reservoir as a desirable future reservoir site. (City Comp. ¶ 29.)

In 2003, the refuge project was reactivated by FWS.

B. 2004.

In July 2004, FWS held workshops to study the area and to provide information to area landowners regarding the land that was proposed for the Refuge. (AR 1204, 1971 (as explained in the EA and FONSI).) On October 13, 2004, FWS gave a presentation to the East Texas Water Planning Group and other members of the public about the potential establishment of the Refuge. (AR 1204, 1971.)

C. 2005.

On March 9, 2005, the Dallas City Council passed a resolution approving consideration of the Fastrill Reservoir and expressing its desire to work cooperatively with the Upper Neches Regional Municipal Water Authority ("UNRMWA") and FWS to determine if the Fastrill Reservoir could meet the dual objectives of water supply and wildlife preservation. (City Compl. ¶ 26.) On March 16 ,2005, the Director of Dallas Water Utilities sent a letter to the Regional Chief of the National Wildlife Refuge System informing FWS of the City Council's

resolution. (City Compl. ¶ 27.) The letter also requested that FWS postpone the Refuge proposal to allow a study to determine how a wildlife refuge and a reservoir could co-exist. (City Compl. ¶ 36.)

In March 2005, FWS released to the public a 93-page proposal to establish the Refuge on the Neches River. The proposal contained a Refuge proposal, the Environmental Assessment, a conceptual management plan, and a land protection plan. (AR 1164-1269.) The EA reviewed two Refuge alternatives, with one containing more land than the other. The EA did not offer an alternative that would allow the Refuge and the Fastrill Reservoir to co-exist. These documents underwent public review beginning March 15, 2005 and ending May 31, 2005. (AR 1972 (as detailed in the FONSI).)

On April 13, 2005, the Dallas City Council approved funding for a formal feasibility study for the Fastrill Reservoir. Also in April 2005, FWS issued a Fiscal Impact Analysis of Land Acquisition Alternatives to the public. (AR 1269-1283.) That document did not analyze the fiscal impact on the City of Establishing the Refuge.

On May 10-11, 2005 FWS conducted public hearings regarding the Environmental Assessment.

In July 2005, the regional FWS office issued a Finding of No Significant Impact and elected to proceed with the proposed Refuge. In the FONSI, FWS stated it did not believe an Environmental Impact Statement was necessary based on its review and evaluation of the information contained in the EA. (AR 1966.) FWS determined that the Refuge would have no significant impact on "the human environment within the meaning of

Section (102)(2)(c) of [NEPA]." (AR 1966.) FWS acknowledged its obligation to consider the cumulative impact of any proposal that included the Fastrill Reservoir and the Refuge existing together. However, FWS determined that the Fastrill Reservoir was speculative in the short term, not definitive in scope and purpose, and far beyond the planning horizon of the Refuge proposal. Consequently, FWS determined it could not "formally evaluate combined or cumulative impacts or details of how the two projects might interface while not attenuating the mutual goals of each project." (AR 1966.) The FONSI was submitted to the Director of FWS for his approval.

On August 16, 2005, the Texas Senate passed a resolution that recognized a need for additional water resources in the Dallas region and identified the Fastrill Reservoir project as a critical resource that could help meet the water supply requirements of the region.

In late-2005, various local and state officials wrote to the Director of the FWS asking him to postpone approval of the Refuge pending completion of the City's feasibility study. Reservoir proponents also asked the FWS Director to meet with them to try to develop a compromise plan that would enable the reservoir and the Refuge to co-exist.

D. 2006.

On April 3, 2006, the FWS Director met with reservoir proponents in Washington, D.C. At that meeting, the reservoir proponents again tried to convince him not to approve the FONSI and the Refuge. The Director of the FWS gave the reservoir proponents until June 1, 2006 to present a viable alternative to the Refuge plan. On April 20 and May 10, 2006, FWS and the reservoir proponents

met to work on developing an alternative proposal(s). As of June 1, no viable alternative plan(s) had been proposed and on June 11, 2006, the FWS Director approved the EA and the FONSI, thereby designating a 25,281-acre site within Anderson and Cherokee Counties, Texas, as the Neches River National Wildlife Refuge and authorizing FWS to begin acquiring property for the Refuge. (AR 2662, 2676, 2682.)

On June 12, 2006, FWS began working rapidly to acquire land for the Refuge. In pursuit of this objective, on August 19, 2006, the Federal Defendants procured a donation of a one-acre conservation easement from Defendants James and Annie L. Yount ("the Younts"). On August 23, 2006, FWS filed the easement with Anderson County.

In November 2006, the TWDB incorporated the Fastrill Reservoir in its 50-year state water plan.

E. 2007.

In January 2007, the TWDB approved its 2007 State Water Plan, which included the Fastrill Reservoir as a potential major water reservoir for Dallas. On January 10, 2007, the City filed this lawsuit in the United States District Court for the Northern District of Texas. That same day, the State filed a lawsuit in the United States District Court for the Eastern District of Texas. That case was transferred to the United States District Court for the Northern District of Texas and was consolidated with the City's lawsuit. Both cases are now before the Court in this action.

III.

A. Partial Motion to Dismiss City of Dallas Complaint.

1. Count VIII - Violation of NEPA and the APA: Executive Orders 13,132 and 13,252.

In its Compliant, the City alleges that the Federal Defendants, by deciding to approve the Refuge without proper deference to the City's planning and development of the Fastrill Reservoir, interfered with the policy-making discretion of the City in violation of both executive orders, thereby harming the City. The City further alleges that the Federal Defendants violated the executive orders by failing to consult properly with the City, be deeming the Fastrill Reservoir "speculative," by failing to adequately consider the water supply requirements of the City, by failing to designate an official to implement the order, and by failing to report to OMB. (City Compl. ¶¶ 125-29.)

The Federal Defendants move to dismiss this claim because both executive orders expressly disclaim creating private rights of action. (Mot. at 8.) The City does not dispute that the executive orders do not provide private causes of action. Rather, the City argues that Fifth Circuit precedent requires that agencies satisfy the substantive terms of executive orders as part of their NEPA compliance and cites *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006)

In *Coliseum Square*, the executive order at issue instructed agencies to consider the "environmental justice impacts of their actions," but did not provide for a private cause of action. *See Coliseum Square*, 465 F.3d at 232. The Fifth Circuit analyzed the agency's environmental

justice study as part of its NEPA analysis because the study was submitted as part of the administrative record and was challenged as being conducted in an arbitrary and capricious manner. *See Coliseum Square*, 465 F.3d at 232. Thus, *Coliseum Square* stands for the principle that when an agency considers an environmental justice study as part of its NEPA analysis and consequently, submits that study as part of the administrative record, that study is subject to arbitrary and capricious review under the APA. *See also Communities Against Runway Expansion, Inc. (CARE) v. FAA*, 355 F.3d 678, 688 (D.C. Cir. 2004) (cited in *Coliseum Square*, 465 F.3d at 232).

In this case, neither party has identified any evidence in the Record indicating that FWS considered, discussed or analyzed the mandates of the executive orders as part of its NEPA analysis. Because FWS's consideration of the executive orders (or lack thereof) does not appear to have been part of its NEPA analysis, it is not subject to the Court's review under the APA. Therefore, the Court concludes that the City's Eighth Claim for Relief, asserting violation of NEPA and the APA based on non-compliance with Executive Orders 13,132 and 13,352 is hereby DISMISSED with prejudice.

2. Counts IX and X - Violation of National Wildlife Refuge System Administration Act ("NWRSAA") and the APA: Failure to Meet Conservation Purposes of Act.

In Count IX of the City's Complaint, the City argues that the donated one-acre easement is void *ab initio* as contrary to the explicit purposes of the Refuge and the requirements of the National Wildlife Refuge System Administration Act ("NWRSAA") and the APA. Count X

of the City's Compliant asserts that because the Federal Defendants failed to acquire water rights in advance of acquiring property in violation of the NWRSAA, FWS's attempt to establish the Refuge is void. *See* 16 U.S.C. § 668dd(a)(4)(G).

The Federal Defendants seek dismissal of these claims for three reasons. First, the Federal Defendants argue that the claims constitute a challenge to FWS's claim of title to the easement, which is governed by the Quiet Title Act. According to the Federal Defendants, the Quiet Title Act is the exclusive means by which a party may challenge the federal government's claim of title to real property and therefore this Court is without jurisdiction to review this claim under the NWRSAA and the APA. Second, the City lacks standing to bring claims under the NWRSAA because its alleged injuries - loss of opportunity to construct a reservoir and disruption to the City's plans for future water resources - do not fall within the "zone of interest" that the NWRSAA is designed to protect. Third, Count X of the City's Complaint, alleging that FWS violated the NWRSAA by failing to acquire water rights in advance of acquiring the easement, should be dismissed because the statute does not include such a requirement.

a. *The Quiet Title Act.*

Like the APA, the Quiet Title Act ("AQTA") contains a limited waiver of sovereign immunity. The QTA allows the United States to be "named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The Quiet Title Act does not "apply to trust or restricted Indian lands." *Id.*

The Federal Defendants argue that the City cannot avoid the QTA and its restrictions by asserting that the easement is invalid under the NWSRAA because the QTA provides the exclusive waiver of sovereign immunity to challenge the United States' title to real property and remains the exclusive means for challenging ownership regardless of whether Plaintiffs are seeking title for themselves or are seeking to contest the United States' title for other purposes. (Mot. at 12-13 (citing *Block v. North Dakota*, 461 U.S. 273, 286 (1983)).) The Federal Defendants also maintain that the City is barred from brining its claim under the APA because the APA does not confer authority to grant relief if another statute that grants consent to suit forbids the relief that is sought. (Mot. at 13 (citing 5 U.S.C. § 702(2)).) Finally, the Federal Defendants argue that even if the City had pled a claim under the QTA, that claim would fail for several reasons.[5] (Mot. at 13-14.)

The City maintains that the QTA is inapplicable to its claims because it is not challenging FWS's claim of title to the easement, but rather is challenging the agency's decision to acquire the land in the first place, which is governed by the APA.

First, the plain language of the QTA indicates that its drafters did not intend for it to be applied to this type of case. The QTA explicitly states that it applies to civil

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5 The Federal Defendants argue that the City's claims are barred under the Quiet Title Act because the City has not alleged jurisdiction under the QTA, because it could not properly assert a claim even if it did, and because the City cannot be granted the relief it seeks (divesting the United States of title) under the QTA. (Mot. at 12.)

actions involving "a disputed title to real property." *See* 28 U.S.C. § 2409a(a). In this case, the City is not asserting a property interest in the land and is not seeking to adjudicate a disputed title to real property. Additionally, the statute requires plaintiffs invoking the QTA to plead with particularity the details of their interest in the property, yet the City possesses no legally recognizable property interest in the easement and therefore, cannot comply with this requirement.

Second, the Federal Defendants' reliance on *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) is misplaced. In *Neighbors*, the court applied the QTA's Indian trust land exemption disallowing the waiver of immunity and barring the plaintiffs from suing the government under the APA. However, this case does not fall within the Indian trust exemption. The policies, rules, regulations and cases governing applicability of the Indian trust exemption are largely irrelevant to these facts. In this case, there is no doubt sovereign immunity will be waived because no exemption applies. Thus, the question remains whether the QTA or the APA governs this case.[6]

The QTA applies when there is a disputed title to real property in which the United States claims an interest. 28 U.S.C. §2409a(a). The Court disagrees with the Federal Defendant's characterization of this case as one involving

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6 The Federal Government repeatedly cites *Block v. North Dakota*, 461 U.S. 273 (1983) in support of its arguments. *Block* stands for the principle that Congress intended the QTA to provide the exclusive means by which adverse claimants can challenge the United States' title to real property. There is no mention in *Block* of the APA and the facts therein are not analogous to the facts of this case.

"a direct challenge to the FWS's claim of title to an interest in real property." (Reply at 3.) Rather, the language of the Complaint and the facts as described indicate that the City is seeking judicial review of the agency's decision to acquire the land. Furthermore, an easement is a non-possessory interest that authorizes its holder to use real property for a particular purpose; it is not a property interest to which title can be had. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002).

Therefore, because the City is not challenging the federal government's title, and because the City does not possess the type of property interest necessary for maintenance of a quiet title action, the Court concludes that 28 U.S.C. § 2409a is inapplicable to Counts IX and X. *See, e.g., City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 471-72 (D.C.D.C. 1978); *State of South Dakota v. United States Dep't of Interior*, 69 F.3d 878, 890-91 (8th Cir. 1995) (dissent).

b. *Standing Under the NWRSAA.*

The Federal Defendants argue that the City's APA claims should be dismissed because the City's alleged injuries - loss of potential opportunity to construct a reservoir and disruption to the City's plans for future water sources - do not fall within the "zone of interests" that the National Wildlife Refuge System Administration Act is designed to protect. (Mot. at 15.)

In addition to satisfying the Article III requirements for standing, a plaintiff challenging an administrative agency's decision must also show that "the interest sought to be protected by the complainant is arguably within the

zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Nat'l Athletic Trainers Ass'n, Inc. v. U.S. Dep't of Health and Human Svcs.*, 455 F.3d 500, 503 (5th Cir. 2006). "In deciding whether a litigant has prudential standing, we must identify what interest the litigant seeks to assert and then decide if that interest is arguably within the zone of interests to be protected or regulated by the statute." *Bonds v. Tandy*, 457 F.3d 409, 414 (5th Cir. 2006). Under the 'zone of interests' test, courts liberally construe Congressional acts to favor a plaintiff's standing to challenge administrative actions, yet not all plaintiffs affected by a regulation or order have standing to sue." *See id.* In cases where the plaintiff is not the subject of the regulatory action, the zone of interests test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit. *See id.*

"The mission of the [National Wildlife Refuge] System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of past and future generations of Americans." 16 U.S.C. § 668dd(a)(2). In its Complaint, the City itself identifies the policy of the NWSRAA as ensuring that "each refuge shall be managed to fulfill the mission of the [National Wildlife Refuge] System, as well as the specific purposes for which that refuge was established." (City Compl. ¶ 57.)

The Federal Defendants argue that whereas the NWRSAA is designed to ensure that there is a national network of lands and waters for conservation and recreational use, the City's interests are in protecting its opportunity to construct a reservoir for future municipal water needs. Thus, because the City's alleged injury - the loss of an opportunity to construct a reservoir - does not fall within the zone of interests to be protected by the statute, the City lacks prudential standing and therefore its claims under the NWSRAA must be dismissed.

The City responds by arguing that it has standing because (1) the City of Dallas has *quasi*-sovereign status for this public health and welfare issue and (2) the City of Dallas is a competitor for the land.

(i) Quasi-sovereign Status.

The City argues that it hold [sic] a special position and interest that entitles it to standing because it is a city, not an individual. In support of this argument, the City cites *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454-55 (2007). However, *Massachusetts v. EPA* is inapposite to this case because it involves Article III standing, not prudential standing. Therefore, the Court is unwilling to extend its reasoning to these facts.

(ii) Competitor Status.

The City also argues that it has prudential standing as FWS's competitor for use of the same area. The City cites *National Credit Union* for the principle that the "zone of interest" test is "sufficiently broad to embrace the interests of an actual or potential competitor." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998). The zone-of-interest test was first

articulated in *Data Processing Service Organization, Inc. v. Camp* and was reinforced in several subsequent cases - all finding that competitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions. 397 U.S. 150 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Clark v. Secs. Indus. Ass'n*, 479 U.S. 388 (1987); *Nat'l Credit Union Admin. v. First Family Bank & Trust Co.*, 522 U.S. 479 (1988).

This case differs from *Data Processing* and its progeny in many ways. First, unlike those cases, this case does not involve a challenge by the plaintiff to FWS's interpretation of a statute. Moreover, even if it did, the purpose of the statute at issue is to ensure that each refuge be managed to fulfill the mission of the National Wildlife Refuge System. The mission of the system is to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2). There is nothing in the statute or the City's briefing to indicate that this statute is designed to protect the City's interest in constructing a reservoir on this land. Moreover, *Data Processing* and its progeny involve statutes that affect economic competition. This statute does not have any effect on competition and the facts of this case do not involve economic competition. That the City and Federal Defendants are "competing" for the same land is something altogether different. The City's competing interest in using the land for water is not arguably within the zone of interests to be protected by

the statute. Therefore, the City's interest is outside the zone of interest sought to be protected by the NWSRAA and the City lacks standing to bring Counts IX and X.

3. Count XI - Violation of the APA - Agency Abuse of Discretion.

Count XI of the City's Complaint alleges a violation of the APA based on FWS abusing its discretion in several areas. The City alleges that the Federal Defendants engaged in several acts that, either individually or collectively, give rise to a cause of action under the APA. In its response brief, the City characterizes this claim as alleging that FWS violated the APA by accepting a one-acre conservation easement in bad faith. (City Resp. at 19.)

The Federal Defendants move to dismiss this claim because APA review cannot be conducted independent of another statute. The City responds by conceding that § 702 does not, by itself, confer subject matter jurisdiction. Instead, the City argues that jurisdiction exists pursuant to § 1331 and cites *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998) in support of its position.

In *Stockman*, the Fifth Circuit noted that § 702 of the APA creates a cause of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The relevant statute, of course, is the statute whose violation is the gravamen of the complaint." *Stockman*, 138 F.3d at 151. In other words, "there is no right to seek judicial review under the Administrative Procedure Act in the absence of a relevant statute whose violation forms the legal basis of the

complaint against the governmental action." C. Wright & A. Miller, 14A Federal Practice & Procedure § 3659 (2007).

In Count XI, the City did not identify a statue that forms the basis of its APA claim. The City's claim is entitled "Violation of the APA - Agency Abuse of Discretion" and alleges that "[t]he federal Defendants' bad faith acceptance of the donation of this one-acre conservation easement is evidence that they acted arbitrarily and capriciously, and abused their discretion, in violation of the APA, 5 U.S.C. § 706(2)(A), and therefore the transfer of the one-acre conservation easement to FWS should be rescinded and the property returned to the Younts." (City Compl. ¶ 153.) The City's attempt in its briefing to provide "substantive and procedural standards" to support its APA claim belies the allegations in the Complaint. (Resp. at 20-22.) There is no mention in Count XI of the Complaint of an underlying statutory violation and therefore, the City is not entitled to judicial review of Count XI.

4. Count XII - Violation of the Tenth Amendment: Absence of Authority Under the Commerce Clause.

In Count XII of the Complaint, the City alleges that by moving to establish the Refuge, the Federal Defendants violated the City's freedom to provide for its future water needs and violated the City's constitutional right to secure a sufficient water supply for its residents, in violation of the Tenth Amendment and the City's right to sovereignty. (City Compl. ¶¶ 155-64.) The City also asserts that because the Commerce Clause does not allow Congress to regulate in instances where there are no significant impacts on interstate commerce, the statutes at issue allowing for acquisition of the property and establishment

of the Refuge should be deemed unconstitutional. (City Compl. ¶ 160.)

In response, the City refines its claim by asserting that the basis therefor is that a FWS exceeded its authority when it acquired the easement in order to prevent the construction of the reservoir. (Resp. at 23-24.) The City argues that the Federal Government's actions did not serve a legitimate public purpose because FWS accepted the easement in order to commandeer the City's water planning resources and to prevent construction of the reservoir. (Resp. at 23.) The City also argues that FWS's acceptance of the easement violates the Tenth Amendment by abrogating the City's sovereign power over its water rights. (Resp. at 24.)

First, the Court points out that the City's alleged basis for its Tenth Amendment claim, as argued in its brief, differs considerably from the allegations pled in the Complaint. For instance, the claim presented in the Complaint is based on the Federal Defendants' alleged violation of the City municipal "right" to secure water for future residents, which is a spurious argument without legal basis. (City Compl. ¶ 161.) Yet the City does not argue in its briefing that it has a legally cognizable Tenth Amendment right to secure a water supply for future residents. Likewise, the Complaint asserts that the Statutes allowing for acquisition of the property and establishment of the Refuge should be deemed unconstitutional because they do not have a sufficiently significant impact on interstate commerce. (City Comp. ¶ 160.) However, in its briefing, the City maintains that it "does not question the constitutionality of FWS's authority to acquire lands or establish refuges under the

NWRSAA." (Resp. at 23.) Rather, it argues that FWS exceeded its authority when it established the Refuge and accepted the one-acre easement in order to prevent construction of the Fastrill Reservoir.

Factual allegations in a brief are not to be considered on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *See Shapiro, Lifschitz, & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F.Supp.2d 66, 73 (D.D.C. 1998; *Allison v. Brooktree Corp.*, 999 F.Supp. 1342, 1347 (S.D. Cal.1998) (considering face of complaint, documents referred to by complaint, and matters subject to judicial notice; not considering facts presented in briefs, affidavits, or discovery materials); *Town of Ogden Dunes v. Bethlehem Steel Corp.*, 996 F.Supp. 850, 855 (N.D. Ind.1998) (complaint cannot be amended by briefs filed by plaintiff in opposition to motion to dismiss). Therefore, the Court cannot accept the City's pronouncement in its brief that its Tenth Amendment claim is based on the theory that FWS's decisions to establish the Refuge and accept the easement were unlawful because they were made with the purpose of thwarting the plans for the Fastrill Reservoir. Furthermore, the City does not provide any authority to support the Complaint's assertion that the Federal Defendants violated the City's so-called "right" to secure a water supply for future residents. (*See* City Comp. ¶ 161.) Likewise, the City concedes it cannot challenge the constitutionality of the statutes allowing for acquisition of the property and establishment of the Refuge. (City Compl. ¶ 160; Reply at 23.)

For these reasons, the Court hereby DISMISSES Count XII of the City's Complaint.

B. Partial Motion to Dismiss State of Texas Complaint.

1. Sixth Claim for Relief - Violation of Executive Order.

Like its counterpart in the City's Complaint, the State has asserted a claim against the Federal Defendants for violating Section 3(a) of Executive Order 13,132. The Federal Defendants move to dismiss this claim because the executive order expressly disclaims creating a private right of action. (Mot. at 7.) The State does not dispute that Executive Order 13,132 does not provide for a private cause of action. Rather, it argues that Fifth Circuit precedent requires that agencies satisfy the substantive terms of executive orders as part of their NEPA compliance and cites *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006).

In *Coliseum Square*, the executive order at issue instructed agencies to consider the "environmental justice impacts of their actions," but did not provide for a private cause of action. *Coliseum Square*, 465 F.3d at 232. The Fifth Circuit analyzed the agency's environmental justice study as part of its NEPA analysis because the study was submitted as part of the administrative record and was challenged as being conducted in an arbitrary and capricious manner. *See Coliseum Square*, 465 F.3d at 232. Thus, *Coliseum Square* stands for the principle that when an agency considers an environmental justice study as part of its NEPA analysis and consequently, submits that study as part of the administrative record, that study is subject to arbitrary and capricious review under the APA. *See also Communities Against Runway Expansion, Inc. (CARE) v. FAA*, 355 F.3d 678, 688 (D.C. Cir. 2004) (cited in *Coliseum Square*, 465 F.3d at 232).

In this case, neither party has identified any evidence in the Record indicating that FWS considered, discussed, or analyzed the mandates of the executive order as it applies to these circumstances. Because FWS's consideration of the executive order (or lack thereof) does not appear to have been part of its NEPA analysis, it is not subject to the Court's review under the APA. Therefore, the Court concludes that the State's Sixth Claim for Relief, asserting violation of NEPA and the APA based on non-compliance with Executive Order 13,132 is hereby DISMISSED.

2. Seventh Claim for Relief - Invalid Conservation Easement.

In the State's Seventh Claim for Relief, the State asserts a stand-alone state law claim under the Texas Conservation Easement Act seeking invalidation of the easement because it does not meet the definition of "conservation easement" as defined by Section 183.001 of the Texas Natural Resources Code.

A conservation easement is created when a private landowner maintains ownership of the land, but voluntarily conveys a nonpossessory interest in the land to an organization to help preserve the land's conservational uses. *See* Tex. Nat. Res. Code Ann. § 183.001(1). Using a conservation easement, a landowner can designate protection of the "natural, scenic, or open-space values of real property" or assure its availability for agricultural, forest, recreational, or open-space use, protect natural resources, maintain or enhancing air or water quality, or preserve the historical, architectural, archaeological, or cultural aspects of real property. *See id.* § 38.001(1).

The Texas act provides that "an action affecting a conservation easement may be brought by: (1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person authorized by other law." *Id.* § 183.003(3). Therefore, a landowner subject to a conservation easement may challenge an easement holder either for termination of the easement or to enforce the holder's responsibilities. Also, an easement holder may sue either to enjoin the landowner from conducting activities the holder believes violate the easement or to enforce the landowner's affirmative obligations. The statute also allows third-parties to bring suit to enforce the terms of the easement when the conservation easement provides for such a right.

a. *The Quiet Title Act.*

The Federal Defendants argue that the State's claim is a direct challenge to FWS's claim of title to an interest in real property and may only be brought under the QTA. The Federal Defendants maintain that the QTA provides the exclusivewaiver of sovereign immunity to challenge the United States's title to real property and remains the exclusive means for challenging ownership regardless of whether the plaintiffs are seeking title for themselves or are seeking to contest the United State' title for other purposes. The Federal Defendants also argue that even if the State had pled a claim under the QTA, that claim would fail for several reasons.[7] (Mot. at 12.)

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7 The Federal Defendants argue that the State's claims are barred under the Quiet Title Act because the State has not alleged jurisdiction under the QTA, because it could not properly assert a

The State maintains that the QTA is inapplicable to its claim because it is not challenging FWS's claim of title to the easement, but rather is challenging the validity of the easement under statutory and common law. (State Compl. ¶¶ 75-88.) The State also points out that this case does not implicate the Indian lands exception. (Resp. at 14-15.)

For the reasons stated *supra*, the Court hereby finds that this case is not governed by the QTA. Because the State does not possess the type of property right necessary for the maintenance of a quiet title action, the Court concludes that 28 U.S.C. § 2409a is inapplicable to this suit.

b. *Standing*.

The Federal Defendants argue that the State's claim is barred because the State does not have standing under the Texas Conservation Easement Act to assert its claim. (Mot. at 12-13 (citing Tex. Nat. Res. Code Ann. § 183.003).) The Federal Defendants contend that because the State is not an owner of an interest in the property burdened by the easement, a holder of the easement, a person having a third-party right of enforcement, or a person authorized by some other law, it lacks standing to sue under the Act. The State responds by maintaining that it is bringing this action as "a person authorized by some other law," and identifies the APA as the "other law" that authorizes it to bring the suit. (State Resp. at 20.)

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claim even if it did, and because the City cannot be granted the relief it seeks (divesting the United States of title) under the QTA. (State Mot. at 11.)

The Texas Conservation Easement Statute affords standing to those with an interest in a conservation easement or in the property burdened by a conservation easement. Under this statute, property owners may challenge easement holders for (1) termination of the easement due to the holder's non-compliance with the statutory requirements or (2) enforcement of the holder's responsibilities to protect and preserve the property.

In this case the State, which has neither an interest in the conservation easement nor in the property burdened by the easement, seeks termination of the conservation easement so it can use the land for its own use - a use other than that for which the easement was intended. The State seeks to invalidate the easement so the land can be used for a water reservoir instead of a wildlife refuge. Rather than using the statute to promote preservation of the land for conservation purposes, the State seeks to use the statute to abolish the easement's requirements so it may use the land for its own purpose. However the statute is intended to provide a vehicle for the easement grantors (*i.e.* the Younts) and holders (*i.e.* the Federal Defendants) to bring an action against one another for failing to use the land in accordance with the statute and the terms of the easement. The State has not provided any legal authority to support its argument that the APA would give it standing to enforce the terms of the statute or the easement for the purpose of protecting the land for a water reservoir.

The Court concludes that the State lacks standing to bring this claim under the Texas Conservation Easement Act and therefore, the State's Seventh Claim for Relief is hereby DISMISSED.

IV.

On April 12, 2007, Defendants James and Annie Yount (the "Younts") filed their motion to dismiss the City's Complaint for failure to state a claim.[8] In its briefing, the City argues superficially that its "claims against the Younts" should not be dismissed because the City should first be allowed to offer evidence to prove its claims.

After reviewing the City's Complaint, the Court finds it somewhat difficult to ascertain the precise nature of the cause of action alleged against the Younts. None of the causes of action are asserted explicitly against the Younts. Count XI of the City's Complaint, entitled "Violation of the APA - Agency Abuse of Discretion," makes a vague reference to the Younts when it states that "On information and belief, FWS conspired with the Younts to procure the transfer of the one-acre conservation easement in an attempt to prevent any challenge to its attempts to create a refuge and in order to prevent the City or State from constructing a reservoir in this same general area." (City Compl. ¶ 151.) This could be interpreted as asserting a claim against the Younts for conspiring to transfer the conservation easement to prevent a legal challenge to FWS's attempt to establish the Refuge and to prevent construction of the Fastrill Reservoir. (City Compl. ¶ 151.) None of the other eleven counts mention or apply to the Younts.

First, Count XI of the City's Complaint has been dismissed against the Federal Defendants because the

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8 The State did not include the Younts as defendants in its lawsuit.

City did not identify a statute that forms the basis of this APA claim. Therefore, the City has no actionable claim against the Younts for "conspiring" with the Federal Defendants on this claim. Second, because civil conspiracy is a derivative tort, a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at lease one of the named defendants liable. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). In this case, the City has not pled any underlying tort upon which a conspiracy could be based.

The City's contention that the Court should not dismiss its claim because discovery will assist it in establishing its claim is backward logic. The City has failed to plead a claim against the Younts. The City may not conduct discovery to prove a claim that has not been pled properly.

The City also explains in its response that it has joined the Younts in this lawsuit because the Younts are a necessary party to the City's request for declaratory relief. The City explains that its claim for a declaratory relief contains a request that the Court rescind the easement that was conveyed by the Younts to FWS. The City cites the rule of law that no decree can be entered that affects title to property unless all persons who are interested in the title and who may be affected by the judgment are properly before the Court. *See Silvas v. Remington Oil and Gas Corp.*, No. 04-60068, 2004 WL 2095628, at *1 (5th Cir. Sept. 21, 2004). Therefore, the City concludes that the Younts should not be dismissed from this lawsuit because, as a party with an interest in the property that would be affected by the Court's ruling, they are a necessary party to the action.

The Younts respond, with citingany authority, that they are not indispensable parties and their joinder is not necessary to afford the relief the City must prove it is entitled to. They note that the State did not join the Younts in its lawsuit, despite seeking the same relief, because rescission can be obtained and disposition of this action accomplished without the Younts as parties. The Younts assert they will "certainly abide by, and be bound by, any judicial pronouncement by this Court ordering the FWS to rescind the conservation easement." (Mot. at 8.)

The claims that would arguably entitle the City to rescission of the one-acre conservation easement are Counts X, XI, and XII, all of which have been dismissed herein. Therefore, the Younts are not an indispensible to this action and the Younts' Motion to Dismiss is hereby GRANTED.

The City has indicated that it intends to amend Count XI of its Complaint to add the allegation that FWS failed to comply with its own policies by failing to obtain secretary approval of the easement, thereby rendering the deed invalid and demonstrating no refuge has been established. The City has ten (10) days from the date of this order to file a newly amended complaint with this new allegation/claim.

V.

Therefore, for the reasons stated herein, the Court hereby GRANTS the Federal Defendants' Motion to Dismiss Plaintiff City of Dallas' Eighth, Ninth, Tenth, Eleventh, and Twelfth Claims for Relief and hereby DISMISSES with Prejudice Counts VIII, IX, X and XII of the City of Dallas's Complaint. Count XI is dismissed

subject to the City filing an amended complaint within ten (10) days from the date of this order. Further, the Court hereby GRANTS the Federal Defendants' Motion to Dismiss Plaintiff Texas Water Development Board's Sixth and Seventh Claims for Relief and hereby DISMISSES with Prejudice Counts Six and Seven of the State's Complaint. The Court also GRANTS the Younts' Motion to Dismiss.

It is SO ORDERED, this 24th day of October 2007.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS, TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
H. DALE HALL et al.,	§	CIVIL ACTION NO.
	§	
Defendants.	§	3:07-CV-0060-P
	§	
_____	§	Consolidated with:
	§	
THE TEXAS WATER DEVELOPMENT BOARD,	§	
	§	CIVIL ACTION NO.
Plaintiff,	§	3:07-CV-0213-P
	§	
v.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are (1) the City of Dallas's Motion for Partial Summary Judgment, filed January 15,

2008; (2) the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning City of Dallas's NEPA Claims, filed February 15, 2008; (3) Plaintiff Texas Water Development Board's Motion for Partial Summary Judgment, filed January 15, 2008; (4) the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning the Texas Water Development Board's NEPA Claims, filed February 15, 2008; (5) the Federal Defendants' Motion to Strike Plaintiffs' Extra-Record Materials, filed February 15, 2008; (6) the Texas Conservation Alliance's Motion for Leave to File Amicus Brief, filed February 15, 2008; (7) Friends of the Neches River's and Houston Audobon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief, filed March 7, 2008; (8) Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment, filed April 7, 2008.

DISCUSSION

The City of Dallas (the "City") and the Texas Water Development Board (the "TWDB" or the "State")[1] (collectively, "Plaintiffs") have filed these consolidated lawsuits against the Federal Defendants[2] ("Defendants")

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1 The TWDB is responsible for administering a comprehensive statewide planning process intended to develop, manage, and conserve the water resources of the State of Texas. *See* Tex. Water Code § 16.051(a) (Vernon 2007). The State of Texas's regional planning groups report to the TWDB. The City of Dallas is Region C.

2 The Federal Defendants include Defendant H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Dick Kempthorne, in his official capacity as the Secretary of

seeking reversal of the United States Fish and Wildlife Service's ("FWS") decision to establish the Neches River National Wildlife Refuge ("Refuge") without preparing an Environmental Impact Statement or an adequate Environmental Assessment as required by the National Environmental Policy Act.

On June 11, 2006, FWS designated a 25,281-acre site within Anderson and Cherokee Counties, Texas as the Neches River National Wildlife Refuge. Plaintiffs want to use the same land on the Upper Neches River for development of a reservoir to serve the future water needs of Dallas residents and other customers. This proposed reservoir is known as the Fastrill Reservoir ("Reservoir"). Defendants' decision to establish the Refuge on this land prompted Plaintiffs to take legal action. Plaintiffs allege that FWS's administrative decision to establish the Refuge was plagued with procedural flaws and statutory violations.

A. National Environmental Policy Act.

The National Environmental Policy Act of 1969 ("NEPA") was established to ensure that federal agencies carefully consider the environmental impacts of their projects and make information about those impacts available to the public. *See* 42 U.S.C. §§ 4321-70(d) (1982); *Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2003). NEPA requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for all "major

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the United States Department of the Interior; Benjamin N. Tuggle, in his official capacity as the Regional Director of the Southwest Region (Region 2) of the United States Fish and Wildlife Service; and the United States Department of the Interior

federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA does not mandate particular results. It imposes procedural requirements on federal agencies by requiring them to take a "hard look" at the environmental impact of their actions. *Sabine River Authority v. U.S. Dept of Interior*, 951 F.2d 669, 676 (5th Cir. 1992); *see also Coliseum Square Ass'n., Inc. v. Jackson*, 465 F.3d 215, 223 (5th Cir. 2006).

NEPA requires a federal agency undertaking an action to determine whether its proposal requires an EIS. To make this determination, an agency must first prepare a more limited Environmental Assessment ("EA"), which is a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS. *See* 40 C.F.R. §§ 1501.4(b), 1508.9(a). If the agency determines based on the EA that no EIS is needed because the action would not significantly affect the environment, it must issue a "finding of no significant impact" ("FONSI"), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment. *See* 40 C.F.R. §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS.

Plaintiffs contend that FWS violated its NEPA obligation by failing to prepare an EIS or an adequate EA with respect to its decision to establish the Refuge. First, Plaintiffs contend that Defendants were required to prepare an EIS because the Refuge decision was a "major federal action . . . significantly affecting the quality of the human environment." Second, Plaintiffs contend the EA was inadequate because FWS failed to provide adequate

evidence and analysis of the indirect impacts of the Refuge designation and failed to consider alternative refuge sites. Third, Plaintiffs allege that FWS failed to take a "hard look" at the environmental consequences of its decision, as illustrated by its decisions to rely on an obsolete study and ignore current data. Fourth, Plaintiffs accuse FWS of violating NEPA by failing to cooperate with state and local officials.

B. Standard of Review.

An aggrieved party challenging an agency's decision that an EIS is not required or challenging the adequacy of an EA may assert its claims in federal court under the Administrative Procedures Act. *See* 5 U.S.C. § 702. The court reviews these agency decisions under the highly deferential "arbitrary and capricious" standard. *See Sabine River*, 951 F.2d at 677-78. When applying this standard, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006).

This Court cannot reconsider anew the facts leading to the establishment of the Refuge or weigh the evidence supporting or contradicting FWS's decision. This Court may only evaluate whether FWS's decision had evidentiary support based on the administrative record at the time the [sic] it was made. Whether or not the Court would have decided similarly is immaterial, so long as the agency considered all relevant factors and had evidence supporting its decision. Thus, Plaintiffs' burden in this case is to show that Defendants had no evidence to

support the decision not to produce an EIS or Defendants disregarded or ignored a factor required in conducting the EA. *See Brenham Cmty. Prot. Ass'n v. U.S. Dep't of Agric.*, 893 F. Supp. 652, 657-58 (W.D. Tex. 1995). This Court "must look at the decision not as a chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." *Gulf Restoration*, 452 F.3d at 368 (internal quotation marks omitted).

C. Amicus Briefs.

Three organizations move for leave from the Court to present their perspectives on these issues.

1. Texas Conservation Alliance.

The Texas Conservation Alliance, which is a conservation organization that works to protect native wildlife habitat and address environmental problems, moves for leave to file an amicus brief which it believes "will bring to this case another perspective, one not shared by the parties to this case." (Mot. for Leave at 2.) The Court hereby GRANTS the Texas Conservation Alliance's motion and instructs the Clerk's Office to file its accompanying amicus brief [Docket No. 106-3].

In its amicus brief the Texas Conservation Alliance reiterates FWS's *Sabine River* arguments that establishment of the Refuge maintains the status quo and there is no causal relationship between establishment of the Refuge and risk of water shortage. (*See infra.*) The brief goes on to describe the value of the Refuge as a habitat for wildlife, for public recreation, and for preserving the environment. The brief also gives

chronological descriptions of the Refuge planning and the Reservoir planning.

2. Friends of the Neches River and Houston Audobon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief.

Friends of the Neches River is a conservation organization that was formed for the specific purpose of protecting the Neches River and its bottomland forests. Houston Audobon Society is a non-profit organization that promotes the conservation and appreciation of bird and wildlife habitats. Both organizations support establishment of the Refuge and formally move to file a letter expressing their support of the Texas Conservation Alliance's brief and adopting its amicus brief as their own. The Court hereby GRANTS the motion and instructs the Clerk's Office to file their accompanying letter of support [Docket No. 111-2].

3. Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment.

The Texas Water Conservation Association ("TWCA") is a statewide association of governmental and private entities that are active and interested in long-term provision of safe and adequate water resources. TWCA maintains that its amicus brief will provide another viewpoint not represented by the parties in this case. The Court hereby GRANTS the Texas Water Conservation Association's motion and instructs the Clerk's Office to file its accompanying amicus brief [Docket No. 123-2].

In its amicus brief, the TWCA maintains that the Administrative Record ("Record") reveals that the NEPA process conducted by FWS was cynically manipulated and unobjective. Despite its assurance that "the purpose of [its] amicus brief is not to repeat, rehash, or oppose the precise legal arguments made by the parties," the amicus brief goes on to reiterate the arguments made by Plaintiffs: (1) that FWS failed to take a hard look at the environmental consequences of its action; (2) that FWS was biased and manipulative in conducting its NEPA analysis; and (3) that FWS did not adequately consider alternatives. The amicus brief also includes a chronological timeline of events. (Amicus Br. at 3-7.)

D. Failure to Prepare an Environmental Impact Statement (EIS).

Both Plaintiffs and Defendants move for summary judgment on the issue of whether FWS was required to prepare an EIS in this case. The City argues that (1) FWS's own guidelines mandate preparation of an EIS; (2) the Department of Interior manual requires FWS to prepare an EIS; and (3) NEPA requires preparation of an EIS because the Refuge may have significant effects on the environment. The State argues that (1) establishment of the Refuge was a "major federal action" and (2) establishment of the Refuge would have significant regional socio-economic effects and significant indirect effects. Defendants argue that the Fifth Circuit's decision in *Sabine River Authority v. United States Department of the Interior*, 951 F.2d 669 (5th Cir. 1992) governs this case and mandates a ruling in their favor.

1. **The *Sabine River* Case.**

In *Sabine River* — a case strikingly similar to this one — the Fifth Circuit held that FWS was not required to prepare an EIS with regard to its decision to accept a conservation easement on 3800 acres of land in East Texas even though acquisition of the easement prevented the plaintiff from constructing a water reservoir on the same land. Like this case, *Sabine River* involved an effort by FWS to preserve land for the sake of protecting wildlife habitats and populations. Like this case, the agency action in *Sabine River* foreclosed the plaintiff from establishing a reservoir on the same land. Like this case, the *Sabine River* plaintiff had "given serious consideration to using [the] land to construct" a reservoir. *Id.* at 673. Like this case, the *Sabine River* plaintiff's "plans for the construction of the reservoir, aimed at satisfying the anticipated need for additional water over the next forty years [in our case, 50 years], were still in the preliminary stages: [it] had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the" water that the reservoir would generate each year. *Id.* Like this case, the *Sabine River* plaintiff filed suit in federal court, alleging that the federal agency's decision interfered with the plaintiff's long-term plan to construct a reservoir, which would ensure that the state's water supply would not be placed in jeopardy in the calendar year 2030 (in this case, 2060 [TWDB 562]). And like this case, the *Sabine River* plaintiff invoked NEPA and argued that FWS's action constituted a "major federal action significantly affecting the quality of the human environment," thereby necessitating preparation of an EIS. *Id.*

Defendants argue that *Sabine River* controls the outcome of this case by presuming this case is indistinguishable from it. Defendants maintain that Plaintiffs' arguments seeking to distinguish this case from *Sabine River* are foreclosed by *Sabine River* which controls the outcome of this case. (Defs.' Cross-Mot. for Summ. J. on State NEPA Claims at 16.) As the State points out, this argument is circular: it assumes that *Sabine River* is not distinguishable, then uses that precedent to foreclose the argument that it is distinguishable. (State Resp. at 3.)

Sabine River requires the Court to conduct an analysis of the facts of each particular case, as governed by the law set forth therein. In order for the Court to determine whether the agency action at issue rises to the level of a major federal action significantly affecting the quality of the human environment under *Sabine River*, the Court may look at whether the agency action at issue (1) precludes any development of the land, (2) changes the character or function of the land, and (3) prohibits any change in the status quo of the land. *See Sabine River*, 951 F.2d at 680. To do this, the Court must decipher from the Administrative Record the scope of the agency action taken and whether the agency action causes a significant change to the land. The Court must also analyze the socio-economic impact of the Refuge decision on the Reservoir and on regional and state water planning generally, and whether the indirect effects of the Refuge are significant within the meaning of NEPA. *See id.*

a. Direct Effect on Physical Environment.

In *Sabine River* the district and circuit courts held that FWS's act of acquiring the easement "'d[id] not alter the environmental status quo; it does not cause any change in

the physical environment. Indeed, the purpose of the [action] [wa]s to foreclose any change in the physical environment o f a particular wetland site.'" *Sabine River*, 951 F.2d at 679 (quoting *Sabine River*, 745 F. Supp. 388, 394 (E.D. Tex. 1990)). The courts also held there was no causal connection between the federal agency action and the alleged change to the physical environment. *See Sabine River*, 745 F. Supp. at 394-95; *Sabine River*, 951 F.2d at 680. The Fifth Circuit noted that NEPA does not require a federal agency to prepare an EIS in order to "leave nature alone." *Sabine River*, 951 F.2d at 679. "NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built." *Id.* The court reasoned that the agency action "did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS." *Id.* The court concluded that an agency action that "precludes any development of the land whatsoever," that does not "change [ ] the character or function of the land," and that "by its terms prohibits any change in the status quo" does not amount to a "'major Federal action[] significantly affecting the quality of the human environment.'" *Id.* at 679-80 (quoting 42 U.S.C. §4332(2)(C) (alteration in *Sabine River*).

In this case, Defendants characterize the agency action as the "establishment of an acquisition boundary for a refuge," which they argue is analogous to *Sabine River*'s acquisition of the conservation easement because it does not alter the status quo of the land. (Defs.' Mot. for Summ. J. on State NEPA Claims at 18; AR 1963 [FONSI].) The City argues that FWS's action is distinguishable from the *Sabine River* action because the agency action in this case was to establish a refuge and

establishment of an actual refuge "'normally require[s] the preparation of an EIS.'" *Sabine River*, 745 F. Supp. at 400 (quoting Dep't of Interior Manual, 516 DM 6, App. 1, 1.3A(1)). This case is arguably distinguishable because the negative easement in *Sabine River* prohibited any change in the physical environment, whereas here the "land use within the [R]efuge boundaries will be in flux." (City Resp. at 2.)[3]

According to the FONSI, FWS's agency action resulted in the "establish[ment] of an [sic] land acquisition boundary." (AR 1963.) It allows for "establishment of the Neches River National Wildlife Refuge" which allows FWS to make land purchases "in fee and easement interests from willing sellers and/or donors, and in coordination with the affected public." (AR 1961.) The "national wildlife refuge will only exist after an interest in land is acquired by the United States within an approved boundary." (AR 1963.) Eventually, FWS will prepare a formal Comprehensive Conservation Plan ("CCP") that will provide detail about Refuge management, with input from the public and in accordance with NEPA. (AR 1973-81.)

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3 To support its position that this federal action will result in change to the physical environment, the State points to the EA which states that FWS "would strive to replace introduced loblolly pine or slash pine species with native hardwoods or evergreens." (State Mot. at 17 (citing AR 1194).) This argument lacks merit because this is a management issue, not an establishment issue and management of the Refuge will be addressed comprehensively in the Comprehensive Conservation Plan and in accordance with NEPA. Additionally, those changes will add more of what is sought to be protected — bottomland hardwoods.

The fact that this case involves establishment of a 25,281-acre refuge, not a 3800-acre non-development easement is immaterial. The fact that establishment of the Refuge will prevent the land from being sold, subdivided, or cleared and used for a reservoir, pastures, tree farms, oil and gas drilling, natural gas pipelines, and residences does not mean that establishment of the Refuge alters the status quo. (City Mot. at 23-32.) The status quo is the condition of the land as it is now. Establishment of the Refuge will not alter the condition of the land as it is today — in fact, it will effect no change in the status quo. Establishment of the Refuge boundary will not result in a change to the physical environment and in fact, preserves the land at issue.[4]

b. Indirect Effects on Environment.

Plaintiffs argue that FWS violated NEPA by failing to address the Refuge's indirect effects on Dallas's water supply, the Dallas economy, and Dallas and Texas's future water planning. (City Mot. at 39; State Mot. at 12, 14-15.) Defendants maintain that NEPA does not require FWS to evaluate the Refuge's potential impact on the City's future water supply or water-planning process for two reasons: (1) those impacts would not be the proximate result of the agency action, and (2) they would be too remote and speculative to determine. (Defs.' Resp. to City Mot. at 34.)

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4 The City argues this is its "*only* opportunity to challenge the FWS's NEPA analysis for establishment of the Refuge" and objects to the FWS's explanation that FWS will be required in the future to conduct NEPA analyses in conjunction with environmental impacts that may occur due to management of the Refuge. (City Reply at 6.) The City's objection does not make the City's case for an EIS any more persuasive and is immaterial to the Court's decision.

An agency must review the direct, indirect, and cumulative impacts of the proposed action when deciding whether or not to prepare an EIS.[5] *See generally* 40 C.F.R. § 1508.9(b).[6] NEPA does not require an exhaustive, detailed discussion of impacts in an EA. *See* Joan E. Drake, Paper, *The NEPA Process - What Do We Need To Do and When?*, 2006 Rocky Mountain Mineral Law Found. Paper 3 (2006). An EA must show the agency considered relevant factors and made a reasoned evaluation. *See Utah Shared Access Alliance v. U.S. Forest Serv*, 288 F.3d 1205, 1213 (10th Cir. 2002). NEPA requires agencies to focus on reasonably-foreseeable impacts "rather than distorting the sum process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). NEPA requires FWS to take into account those effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) (internal quotation marks omitted). "A 'but for'

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5 "Direct effects" are caused by the action and occur at the same time and place. "Indirect effects" are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable. "Cumulative impacts" result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. §§ 1508.8(b), 1508.7.

6 40 C.F.R. 1508.9(b) ("[An] Environmental Assessment shall include "*brief* discussion of . . . the environmental impacts of the proposed action." (emphasis added); *id.* § 1508.8 (environmental impacts include direct and indirect effects of the proposed action); *id.* § 1508.27 (inquiry into whether action has "significant" effect must include cumulative impacts). NEPA uses the terms "effects" and "impacts" interchangeably. *See* 40 C.F.R. § 1508.8.

causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.* (internal quotation marks omitted). "Rather, a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action." *Id.*

Sabine River requires a court to evaluate whether the agency action had an indirect adverse impact on the environment, such as on the water supply and planning, the local economy, or the population. *See Sabine River*, 951 F.2d at 680. In *Sabine River*, the court held that aside from the absence of any change to the physical environment, it doubted whether the adverse impact on water quality and supply could be precisely attributed to FWS's acquisition of the easement. *See id.* The court believed any link between acquisition of the easement and adverse impact on water supply was too unpredictable and speculative to be considered a significant environmental impact. *See id.*

Plaintiffs argue FWS had much more information about the effects of the Reservoir on the City's water supply than it did in *Sabine River*, thereby rendering this Reservoir project non-speculative. For example, in this case the Fastrill Reservoir was listed as a planned reservoir in two regional water plans, a potential construction date has been set, the facility and unit costs are calculated, and the economic consequences of not adopting the proposed water management strategies have been estimated. (State Resp. at 4-5.) Plaintiffs also argue that this case is distinguishable from *Sabine River* because the *Sabine River* reservoir was not listed in the

state water plan on which FWS reasonably relied when conducting its EA. The State argues that because the Fastrill Reservoir was listed as a potential future reservoir site in two state water plans, FWS was aware of the need for the Reservoir and Plaintiffs' plan to construct it.

Though the water plan in *Sabine River* did not list the *Sabine River* reservoir as a planned reservoir, FWS did review the *Sabine River* Authority's Master Plan which contained its own water supply projections to support the conclusion that the reservoir at issue was necessary. *See Sabine River*, 745 F. Supp. at 398. The district court found that FWS "fully considered the available data on future water supply needs" of the relevant region. *Id.* at 399. This is analogous to FWS having the two Water Plans and corresponding data on future water supply needs in this case.

Plaintiffs further argue that this case is distinguishable from *Sabine River* because here, Plaintiffs have a projected construction date for the Reservoir and have calculated facility and unit costs. Furthermore, Plaintiffs' assert that the inability to construct the Reservoir will have known and significant impacts on the region's water supply and economy as set forth in the State's 2006 Water Plan for Region C.

The flaw in the Plaintiffs' position is that these adverse effects will not be caused by establishment of the Refuge or Plaintiffs' inability to develop the Fastrill Reservoir. The drought conditions described in the State's 2006 Water for Texas Plan for Region C presume no new water supplies being developed over the next fifty years. (TWDB 280-83.) Plaintiffs do not anticipate building the Reservoir until 2050 or tapping into the Reservoir until

2060 — long after these alleged effects would be felt. (TWDB at 562.) Additionally, there are many other factors that could affect the water supply for the region that FWS cannot control or foresee, for example, the City's and the State's water planning processes, how Plaintiffs choose to address the region's future water supply needs, from where the City purchases its water, whether and to what extent the City adopts water conservation measures, and whether and when the City develops new sources of water. The Fifth Circuit has noted that "it is doubtful that an environmental effect may be considered as proximately caused by [an agency action] if that effect is directly caused by the action of another government entity over which the [agency] has no control." *Shoreacres*, 420 F.3d at 452. Establishment of the Refuge boundaries today cannot be said to be the legal and proximate cause of deficiencies in the City's water supply fifty years from now. While it is reasonably foreseeable that establishment of the Refuge will cause the Reservoir to be thwarted, it is beyond FWS's capability and NEPA's scope to require FWS to identify all possible consequences that could be caused by the Reservoir not being built. The Court finds that the effects of FWS's action upon the City's and the State's water supplies are not within the scope of NEPA and can not form the basis of a NEPA claim.

2. Department of Interior Guidelines.

The City argues that an EIS was required pursuant to Department of Interior guidelines, which mandate preparation of an EIS when a new refuge system proposal conflicts with local land use plans. (City Mot. at 4, 20.)

The Department of Interior provides guidelines for FWS to follow when implementing NEPA. *See* NEPA

Rev'd Implementing Procedures, 62 Fed. Ref. 2375 (Jan. 16, 1997)). These guidelines "provide general guidance for NEPA compliance" for FWS activities and list those "major actions normally requiring an environmental impact statement." *Id* at 2376. The guidelines state that, "[m]ajor proposals establishing new refuge systems" "*when determined to be a major Federal action significantly affecting the quality of the human environment*, will normally require the preparation of an EIS." *Id.* at 2382 (emphasis added). What the City fails to mention is that establishment of a refuge requires an EIS only when the action significantly affects the quality of the human environment. Because the City has not demonstrated that establishment of this Refuge will significantly affect the human environment, no EIS was required pursuant to the Department of Interior guidelines.

3. FWS Guidelines.

FWS has its own set of guidelines to help its staff determine whether a particular agency action will require preparation of an EIS. (City Mot. App. at 101-06.) FWS advises that certain criteria "*may* trigger the preparation of an EIS," "depending on the severity and duration of [the] effects." (City Mot. App. at 102 (emphasis added).) Despite the discretionary language of the guidelines, the City alleges that in this case, the guidelines "compel[] the preparation of an EIS." (City Mot. at 18.) Specifically, Plaintiffs argue that because the agency action (1) "expos[es] *existing or future* generations to increased safety or *health hazards*;" (2) "*conflicts* with *substantially proposed or adopted local, regional, State, interstate, or Federal land use plans or policies* that may result in adverse environmental effects;" and/or (3) has "adverse

effects on *municipal*, industrial, or agricultural *water supply* or quality; or *major consumptive use* or other *long-term commitment of water*," FWS was required to conduct an EIS. (City Mot. App. at 102-03.)

The Court is not persuaded by Plaintiffs' arguments. The underpinning of the guidelines is a showing of causation; the agency action must be shown to cause adverse environmental effects. The City has not established that establishment of the Refuge will cause adverse effects to Dallas's future water supply. *See, e.g.*, *Sabine River*, 951 F.2d at 680 ("[t]he inquiry in NEPA cases is whether the federal action at issue is 'proximately related to a *change* in the physical environment.'"). It is too tenuous an argument to say that establishment of the Refuge boundaries will be the proximate cause of hazardous drought conditions or a shortage of water for future Dallasites. The City has not established that the Reservoir at this location is the only water source available to meet Dallas's future needs. Nor has the City established with certainty that the Reservoir would, in fact, be built; the Fastrill Reservoir was not a *substantially proposed or adopted* land use plan — planning was in its infancy — the feasibility study had not yet been finalized and the City had taken no concrete steps to construct the Reservoir, such as official authorization, funding, permitting, design studies or environmental studies. *Cf. Sabine River*, 951 F.2d at 673 (finding reservoir project was still in the preliminary stages when plaintiffs "had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the" water

that the reservoir would generate each year).[7] Therefore, the Court finds that the FWS guidelines did not mandate preparation of an EIS in this case.

For all these reasons, the Court concludes that FWS did not act arbitrarily and capriciously by deciding not to issue an EIS in this case.

E. Adequacy of the Environmental Assessment.

An EA is a "concise public document" that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. *See* 40 C.F.R. § 1508.9. "An EA is 'a rough cut, low-budget environmental impact statement that is designed to show whether a full-fledged environmental impact statement — which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project — is necessary.'" *La. Crawfish Producers Ass'n - W. v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006) (quoting *Sabine River*, 951 F.2d at 677).

An EA must "include brief discussions of [1] the need for the proposal, [2] alternatives as required by section

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7 Plaintiffs' characterization of their "planning" as "distinctly more concrete" than the *Sabine River* reservoir is not supported by the record evidence. For example, the fact that communication may have been initiated with officials who would be involved in the process of obtaining permits for the reservoir does not mean that the application process had begun or that any permit had been obtained. In fact, initiation of discussions is a far cry from actual acquisition of permits. (*See* City Resp. at 5 (citing TWDB0595).) What the evidence indicates is that virtually no real planning had been done between 1961 and the time FWS announced its decision to establish a refuge on the land. Even preliminary planning was not initiated until 2005 – two years after FWS began taking the necessary steps to establish the Refuge.

102(2)(E), [3] the environmental impacts of the proposed action and alternatives, and [4] a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b).

The thirty-eight page EA in this case evaluates the "scope and dimensions of the proposed [refuge] boundary." (AR 1168.) The EA lists three refuge alternatives: (A) a "no action" alternative,(B) the recommended 25,281-acre configuration, and (C) a smaller and narrower 15,294-acre configuration. (AR 1174-75.) The EA acknowledges that the Fastrill Reservoir had been proposed for the Neches River and that the City had contracted for a feasibility study on its potential development. (AR 1178.) The EA does not include an alternative that discussed a Refuge/Reservoir combination. The EA explains that FWS "considered the reservoir project speculative in the short term, and not definite in scope and purpose," accordingly, FWS could not "formally evaluate the combined or cumulative impacts or details of how the two projects might interface while not attenuating the mutual goals of each project." (AR 2971; *see also* AR 1185.) In discussing the "no-action" alternative, the EA recognizes that if the Refuge is not established, the Reservoir "could eventually be built." (AR 1190, 1200.) In the other two alternative discussions, the EA notes that establishment of the Refuge would prevent development of the Reservoir. (AR 1194, 1998.)

The City argues that the EA is deficient because FWS failed to (1) assess a reasonable range of alternatives; (2) analyze many of the indirect and cumulative impacts; (3) use current information in its analysis; (4) supplement the EA and FONSI in light of new information and circumstances; (5) consider the economic impacts on the

city of Dallas; and (6) coordinate and consult with State and local agencies. FWS maintains it reasonably evaluated each of these issues and appropriately issued a fording of no significant impact.

1. Consideration of a Reasonable Range of Alternatives.

NEPA mandates that the agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). An EA must include a reasonable range of alternatives, but NEPA does not require an agency to discuss "all proposed alternatives, no matter what their merit." *See La. Crawfish Producers*, 463 F.3d at 356. "'[T]he range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial.'" *Id.* at 357. "NEPA's requirement with regard to an agency's consideration of alternatives is subject to a rule of reasonableness." *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 793 (N.D. Tex. 2003) (Cummings, J.). The rule of reason applies to the range of alternatives considered as well as the extent the EA must discuss each alternative. *Id.* There is no need for an agency to analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative or . . . impractical or ineffective. *See Fuel Safe Wash. v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1323 (10th Cir. 2004) (internal quotation marks omitted) (omission in original). Alternatives that do not accomplish the purpose of an action are not reasonably. *See Davis Mountains*, 249 F.

Supp. 2d at 793. Where conflicting evidence is before an agency, the agency and not the court has the discretion to accept or reject from the several sources of evidence. *See Sabine River*, 951 F.2d at 678.

Under the highly deferential standard of review the Court must use, the Court may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment. *See id.* at 676.

a. The Joint Refuge/Reservoir Alternative.

The City argues that FWS acted arbitrarily and capriciously by refusing to consider an alternative that would include both the Refuge and the Reservoir. FWS responds that it was not required to evaluate a joint Refuge/Reservoir alternative because such an alternative would have been speculative. The EA concludes that because the feasibility study had not yet been done and because the Reservoir project was far beyond the planning horizon for the Refuge proposal, it was too speculative to determine how the two projects might interface. (AR 1185, 1966.)

In *Sabine River*, FWS did consider in its EA the alternative of establishing a refuge in conjunction with the reservoir. *See Sabine River*, 745 F. Supp. at 399. FWS rejected that alternative because it would not prevent destruction of the wetland habitat FWS was trying to preserve. *See id.* FWS also concluded that any area set aside for refuge purposes would be of inferior quality. *See id.* This decision was supported by a Texas Parks and Wildlife report which suggested that wetland sites

established in conjunction with reservoir projects are of only marginal value to the waterfowl populations. *See id.*

The Record establishes that Plaintiffs' plans for constructing the Reservoir were aimed at satisfying an anticipated need for additional water in 2060. The Reservoir would not even be constructed until 2050 and planning for its construction was in the preliminary stages. Plaintiffs had not obtained any of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the water that the Reservoir would generate each year. The Court concludes that it was not arbitrary and capricious for FWS to conclude that a combined Refuge/Reservoir alternative would be too speculative.

b. Alternate Refuge Site.

Plaintiffs also maintain that FWS violated NEPA because it did not appropriately consider an alternate site for the Refuge. (City Mot. at 35-37.) In March 2006, FWS was presented with the draft feasibility study which outlined some preliminary alternate sites for the Refuge. (AR. 722-24.) On April 3, 2006, FWS Director Dale Hall met with the City and the Upper Neches Regional Municipal Water Authority ("UNRMWA") in Washington, D.C. to discuss co-existence of the Refuge and the Reservoir. At this meeting, the Reservoir proponents gave a presentation about the Reservoir and the City's water news and requested that Director Hall not approve the FONSI until both Parties have an opportunity to work together to identify an alternate refuge site of equal or greater value for preservation of bottomland hardwood habitat. (AR 2077, 2128.) Director Hall agreed to postpone his decision until June 1, 2006. (AR 2067, 2076,

2154, 2210.) In the interim, the parties established a "technical/scientific team" that was comprised of an FWS representative to work with the City, its consultant HDR Engineering, Inc. ("HDR"), the UNRMWA, and the State of Texas Parks and Wildlife Department. Throughout May 2006, FWS was kept informed of the progress of the technical/scientific team. FWS was involved in phone calls, emails and meetings with members of the technical/scientific team where the issue of alternative sites for the Refuge was discussed. (AR 2062-64, 2067, 2075-80, 2175-77, 2531-33, 2579.) According to the Texas Parks and Wildlife Department, the technical/scientific team spent considerable time mapping, researching, and discussing alternate sites, yet as of May 31, 2006, "an alternative site that is equal to or bigger and/or better than the North Neches site has not yet been identified." (AR 2051-52, TWDB 1028-29.) The alternate refuge sites had problems that made them undesirable: i.e., forest conditions, conflicts with previously identified reservoir sites, and land ownership issues. (AR 2052.) "At this point in time, there are too many unknowns regarding the appropriateness of the alternative sites. Criteria such as current forest condition and willingness of owners to sell have not been identified." (AR 2051; *see* AR 2052, 2531.) On June 7, 2006, HDR sent an email to FWS outlining the progress made to date, but failing to present an alternative site that is equal to or better than the Refuge site. (AR 2054-57.) FWS reviewed the email and noted it did not provide a viable alternative site. (AR 2054.) FWS continued to meet with the technical/scientific team after the FONSI had been signed and the Refuge boundaries had been established. (TWDB 982.) Even assuming there were conflicting alternate Refuge sites available, FWS had

discretionary authority to establish the Refuge in its current location.

In November 2007, HDR issued a final feasibility study report ("2007 Report") that analyzed four potential alternative preservation sites in detail. In its 2007 Report, HDR detailed its research findings of land ownership, conflicts with reservoir sites, preliminary hydrologic comparisons of the proposed Refuge and alternate sites, and land cover summaries with information on bottomland hardwood acreage. (2007 Report at 2-1.) According to Plaintiffs, much of the underlying data for the report was available to FWS before the Refuge decision was made. (State Mot. at 24.) The 2007Report concludes that the Middle Neches River and Neches River South are of "apparent value greater than or equal to that of the" original Refuge site. (2007 Report at 4-1, 4-2.) The 2007 Report also states "there are opportunities for managed co-existence of Fastrill Reservoir and a significant portion of the planned [Refuge] for the multiple objectives of water supply and wildlife habitat management and preservation." (2007 Report at 4-1.)[8] Plaintiffs claim this evidence and these conclusions

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8 FWS objects to and moves to strike as extra-record evidence created after the final agency decision was made the Affidavit of William F. Mullican III (TWDB Ex. 1); Affidavit of Samuel K. Vaugh (TWDB Ex. 2); Affidavit of Samuel K. Vaugh (City App. at 1-7); *Fastrill Reservoir & Bottomland Hardwood Preservation Opportunities*, HDR Engineering, Inc., Nov. 2007 ("2007 Report") (TWDB Ex. 3.). The Federal Defendants also object to Plaintiffs using their Complaints as summary judgment evidence. The Court DENIES FWS's motion to strike to the extent the data contained in the Vaugh affidavits and the 2007 Report is used for determining whether FWS took the requisite hard look at the environmental consequences of its

were available to FWS prior to May 31, 2006, and that these sites were better than the site chosen by FWS.

In *Sabine River*, the court stated that "where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence." *Sabine River*, 951 F.2d at 678. The court may only review its decision for arbitrariness and capriciousness.

FWS had before it its own evaluation of the current site and its value for Refuge purposes. Using its own expertise in evaluating the properties of the land, FWS's Concept Plan identified the Neches River Refuge as "Priority 1" for conservation as far back as 1985. (AR 1169.) FWS staff conducted a site visit in January 2004 to evaluate the composition and condition of the land for refuge purposes. (AR 554-58.) It had evidence that no other proposed site was equal to the current site and the alternate refuge sites may have had problems that made them undesirable: *i.e.*, forest conditions, conflicts with previously identified reservoir sites, and land ownership issues. (AR 2051-53.) The fact that the area's bottomland hardwood cover is diminishing does not mean FWS was arbitrary in choosing the area for a refuge. (*See* AR 554 acknowledging deterioration of bottomland hardwoods in the region). In fact, it may be that FWS wants to preserve the bottomland hardwood cover that remains. FWS was entitled to establish the Refuge boundaries in the location it chose

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decision. Much of the data contained therein was available to FWS or was in its possession at the time the agency decision was made. With respect to the Mullican Affidavit and the verified Complaints, the motion to strike is DENIED as MOOT.

instead of in the areas proposed in the 2007 Report. The fact that FWS was faced with conflicting evidence does not establish that FWS acted arbitrarily or capriciously in choosing these particular Refuge boundaries over others.

Although FWS did not analyze the alternative of establishing a refuge in conjunction with the reservoir *in the EA*, the Record evidence establishes that FWS did consider and reject that alternative because the Reservoir would destroy the habitat FWS was trying to preserve. *See Sabine River*, 745 F.2d at 399. The Record contains sufficient evidence to support FWS's conclusion that the Reservoir project was speculative and inconsistent with FWS's objective. FWS did not act arbitrarily and capriciously given the available data at the time of the decision and in light of the fact that establishment of the Refuge will have no significant impact on the environment. Given the deferential standard of review, the Court concludes that the FWS adequately considered alternatives and was not arbitrary or capricious in its decision to adopt Alternative B.

3. Use of Current Information in Environmental Assessment.

The City argues that FWS violated NEPA by failing to use "current information" in its EA, instead using a twenty-year-old analysis of the bottomland habitat. (City Mot. at 40-44; AR 19.)[9] The City argues the EA did not use current data and accurate scientific analysis in its discussions of the Refuge's alternatives or the Refuge's

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9 The twenty-year-old study to which the City refers is a 1985 FWS report entitled "Land Protection Plan for Bottomland Hardwoods Category 3, Texas and Oklahoma."

impacts on wildlife, vegetation, the environment, air, and socioeconomic conditions. (AR 1178-82, 1184, 2987.) FWS does not dispute that it relied on "certain older studies" and responds that its reliance on those older studies does not invalidate the EA. (Defs.' Resp. to City Mot. at 38.) In this NEPA challenge, Plaintiffs must show that FWS's use of old data likely led to a flawed assessment of environmental consequences and that FWS's use of such data resulted in a decision that was arbitrary and capricious. The City contends that FWS's use of this outdated data caused FWS to overlook the fact that the area's bottomland hardwood cover has diminished from seventy-one percent to thirty-one percent since 1985. (2007 Report at 3-4.) The City presumes that the presence of waterfowl and other migratory birds would have changed in light of the diminishment of bottomland hardwoods habitat. (City Reply at 18.) FWS's own 2004 site visit noted that a portion of the land "had been partially harvested since we looked at the site in the late 1980s." (AR 554.)

It is important to remember that "the ultimate purpose of the EA is to lead to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant [environmental] impact." *Spiller*, 352 F.3d at 238 (internal quotation marks omitted). Only when outdated information affects an agency's ability to properly assess the environmental impacts of its action does the NEPA analysis come into question. Thus, the Court must consider whether the data used by FWS was so deficient as to lead to a flawed assessment of the environmental consequences of the Refuge and an inaccurate evaluation of alternatives. The challenging

party has the burden of making this showing. The Record evidences that FWS met with the City, the UNRMWA, and the State of Texas Parks and Wildlife Department to discuss the Refuge proposal and plans for a Reservoir. The Record evidences that FWS evaluated the new information provided during those meetings, including the draft Feasibility Study, and decided to move forward with its approval of the Refuge proposal. (AR 2054-55, 2067.)

The City's briefing is replete with conclusions and speculation, but is lacking in detailed discussion of particular ways the new data and conclusions affect the ultimate environmental assessment. Despite spending considerable time mapping, researching and discussing alternate sites for the Refuge, Plaintiffs were unable to identify an area that was equal to or better than the Refuge site as of June 1, 2006. (AR 2052.) The City has not shown that more current data would have revealed the existence of a significant environmental impact or a different set of alternatives. Even if the alternatives set forth in the 2007 Report were considered by FWS, as stated *supra*, FWS had the discretion to decide between the conflicting evidence which it would accept. *See Sabine River*, 951 F.2d at 678. The City's repeated arguments that FWS "should have" done this, or "could have" done that is not enough to show FWS acted arbitrarily and capriciously, given the deferential standard the Court must apply.

4. Evaluation of Economic Impacts on the City of Dallas.

The City argues that FWS acted arbitrarily and capriciously by failing to adequately consider the economic impacts of the Refuge on the City of Dallas. (City Mot. at

45-46.) The City reasons "there is nothing speculative about the fact that if the refuge is established it precludes the planned reservoir." (City Reply at 23.)

While this is true, what is speculative is the likelihood that the Reservoir would have been constructed at all, and the effect that not having the Reservoir at this location would have on the City's water supply. The speculative nature of these issues has been discussed at length, *supra*. FWS was not arbitrary or capricious in concluding that establishment of the Refuge's boundaries would not have a directly ascertainable economic impact on the City or the City's water supply.

5. Coordination with State and Local Agencies.

The City argues that FWS acted arbitrarily and capriciously by "ignoring state and local concerns" and by misleading state and local agencies into believing they were engaging in cooperative consultation with FWS. (City Mot. at 46.) The City also argues FWS was under a mandatory obligation to coordinate with affected state and local governments. Plaintiffs believe FWS did not conduct its NEPA analysis in good faith; that its apparent willingness to cooperate and consider alternate sites was a sham because FWS had prejudged the issue and was unwilling to consider any other options. (State Mot. at 27-28; City Mot. at 13-15.) The State points to two statements made by FWS Director Dale Hall. (State Mot. at 27-28.) In one email dated February 2005, then-Regional Director Hall sent an email to his staff giving them a "heads up" about the proposed Reservoir in which he wrote, "it just doesn't make sense to flood out highly productive wetlands like these for a water project that has found no justified need." (AR 574.) Hall's second

email, sent a month later, says "the smart way to approach this is not to be seen as saying 'no way,' but rather emphasizing the difficulty in replacing such an important, and limited bottom and hardwood resource and that we simply don't see how that could be done through mitigation." (AR 459.) The City also cites an email from FWS's Tom Baca in March 2005 that states "even if the full [City] council votes in favor of a study for Fastrill, by the time they get a study contracted and completed, we will hopefully have received the director's approval. (Trying to be an optimist :)." (AR 1768.) The City also quotes a portion of an email from Tom Baca who wrote in April 2006 that "to agree to some compromise mitigation proposal is not only biologically unsupportable, it is unconscionable in the realm of responsibility to the local citizenry. Just between us, a total betrayal." (AR 2191.)

These emails do not vitiate the good faith or reasonableness of the NEPA analysis. According to the Record, Tom Baca was not involved in the meetings with the reservoir proponents and was not the final decision-maker with authority to approve the Refuge boundaries. In fact, in an April 2006 email to Tom Baca, another FWS official wrote that "Jim Neal [is] on the team" to review the Reservoir proponents' proposal and he "will certainly look at their proposal very objectively." (AR 2191.) Then-Regional Director Dale Hall's email excerpts show that Hall, as an FWS official, was working to promote establishment of the Refuge — which was his job to do. The Record does not establish that FWS was participating in a scheme to feign cooperation in an attempt to appear in compliance with NEPA. Director Hall was a participant in phone calls and meetings with the Reservoir proponents — at the request of Plaintiffs

and after the EA had been drafted — to give them an opportunity to have their collective voice heard on the Refuge/Reservoir issue. FWS reviewed the materials and heard the arguments. FWS representatives traveled to attend meetings about alternative sites after the FONSI and EA were issued. Though there is evidence that FWS was very committed to this Refuge project, the evidence does not establish that the agency avoided conducting a proper NEPA analysis.

Plaintiffs also argue that FWS was not cooperative because Director Hall's June 1, 2006 deadline was arbitrary. They intimate that Director Hall unreasonably hurried the scientific/technical team in their task of identifying a viable alternate refuge site. Plaintiffs argue that FWS unreasonably placed the onus of identifying an alternate site onto the Reservoir proponents.[10]

FWS officially introduced its proposal for the Refuge to the public in June 2004. This was followed by the scoping phase, during which FWS identified the important issues

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10 The City's conclusory statement that the FWS "manufactured an arbitrary twenty-year planning horizon to avoid consideration of the reservoir in its alternatives analysis" is unsupported by the Record. (City Mot. at 36.) There is no evidence that using a twenty-year window for planning purposes is manufactured or arbitrary; nor is there evidence that FWS used that time frame to avoid consideration of the reservoir in its alternatives analysis. The State argues there is no basis in law or policy for FWS's twenty-year planning horizon for its Refuge. (State Mot. at 13-14.) The State notes that the Refuge is designed to last "essentially forever." (State Mot. at 13.) Yet FWS must set some kind of time frame for its evaluations; it cannot have an interminable planning period. Plaintiffs have not established that FWS's twenty-year planning period is arbitrary and capricious.

to be analyzed in the EA. After conducting public meetings about the proposal, the EA was drafted in March 2005. The EA and FONSI were signed by Director Dale Hall in June 2006. It bears mentioning that during this time, the City worked to apply political pressure on FWS through a letter-writing campaign and by having local and state governmental bodies pass resolutions. (AR 1852-93, 1899-1900.) The City does not appear to have spent its time and resources during this period researching the feasibility of a joint Refuge/Reservoir project, an alternate refuge site, or an alternate reservoir site. There is no evidence in the Record and no mention in the briefing of any willingness or effort on the City's part to find an alternate reservoir site. Had Plaintiffs been working diligently on any of these objectives from June 2004 through April 2006, their request for more time might seem reasonable. But to complain that more time is needed to conduct research that could have and should have been done earlier seems disingenuous. Long after the scoping period had expired, the EA was drafted, and the public hearings concluded did Plaintiffs ask for more time to conduct their own research. After waiting nearly two years, FWS gave Plaintiffs an additional two months. It ended up taking Plaintiffs another year and five months to collect and analyze the data.

Plaintiffs implicitly argue that FWS should have waited another year and five months after the EA was signed for the remainder of the data to be collected and analyzed before making its decision to establish the Refuge boundaries. NEPA does not require an agency to delay a final agency decision indefinitely while others work to develop an alternative that will meet everyone's

needs. Nor does NEPA require an agency to spend an unreasonable amount of time searching for an alternative.

NEPA does not mandate inter-agency consultation before a draft EA is prepared. Although the applicable regulations do not address the timing of inter-agency consultation in the preparation of an EA, they do provide that after preparing a draft EIS and before preparing a final EIS, the agency shall obtain the comments of other federal agencies and request the comments of appropriate state and local agencies. *See* 40 C.F.R. § 1503.1(a)(1), (2). The regulations further provide that an agency shall respond to such comments. *See id.* at § 1503.4(a). There is nothing in NEPA or the applicable regulations to suggest that the timing of consultations should be any different when an agency prepares a draft EA as opposed to a draft EIS.

FWS officially introduced its proposal for the Refuge to the public in June 2004. (AR 1971.) This phase, known as the "scoping" phase, was designed to assist FWS in identifying the "important issues to be analyzed in the environmental assessment for potential impacts of the proposal." (*Id.*) Before the proposal went public, elected officials including U.S. Senators, U.S. Congressional representatives, State Senators, State Representatives, and County Judges were notified of the proposal by letter. (*Id.*) FWS notified the affected landowners of the proposal by letter in July 2004. (*Id.*) FWS held two "scoping workshops" in July 2004 to provide information, answer questions, and elicit affected landowners' issues and concerns about the proposed Refuge. (*Id.*) FWS also notified the Texas Parks and Wildlife Department, the two County Farm Bureau presidents, and the Texas State

Railroad. (AR 1971.) FWS conducted a presentation for the East Texas Regional Water Planning Group in October 2004. (AR 1971.)

After the EA was drafted in March 2005, it was publicly circulated to public officials; affected federal, state and local agencies; conservation organizations; academic institutions; affected landowners; and others expressing interest in the Refuge. (AR 1204, 1999.) These documents underwent public review from March 1, 2005 to May 31, 2005 and public hearings were held on May 10 and 11, 2005. (AR 1999.) A Fiscal Impact Analysis was conducted and distributed to the public. (AR 1972.) Both the City and the State were invited to voice their concerns and meet with FWS during that comment period (AR 567, 816).

During the comment period, FWS recorded and responded to 1693 written comments, many of which concerned the future of the Reservoir. (AR 1999-2028.) FWS received and responded to dozens of letters from state, federal, and local officials about the Refuge and the Reservoir. (AR 1337, 1344-45, 1358-59, 1366-67.)

After FWS's then-Regional Director Dale Hall approved the EA and issued the FONSI in July 2005, City and State officials asked FWS to delay its final decision and to meet with its representatives. (AR 1854, 1859-60.) FWS accommodated these requests, and on April 3, April 20 and May 10, 2006 — long after the comment period had passed — the then-Director Hall met with City and State Reservoir proponents about the future of the Refuge and the Reservoir. (TWDB 557-74; AR 2175-77, 2531-33, 2579.) The attendees at the meetings included

representatives of the City, HDR, the UNRWA, the State, and FWS.

The Record demonstrates that FWS considered and responded to comments raised by other governmental agencies, including Plaintiffs, concerning the future of the Reservoir'. The Record indicates that FWS took into account Plaintiffs' concerns before making its final decision and involved other government agencies before preparing its EA. (AR 1299, 1306-11); *See* 40 C.F.R. § 1501.4(b). That FWS did not agree with the objections raised by the City and the State and others does not undermine the adequacy of FWS's NEPA review.

The record reveals that FWS adequately considered that Plaintiffs wanted to use this land fora Reservoir, but FWS nevertheless chose to establish the Refuge boundaries in the area. A review of the claims and the record indicate that Plaintiffs' disagreement with FWS is more akin to a political dispute over policy choices than a legal dispute over compliance with the procedural requirements of NEPA. "Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983). To permit Plaintiffs to use the provisions of NEPA to voice their policy objections to FWS's actions and to hinder FWS's attempts to fulfill its mandate from Congress would be contrary to the purposes of NEPA.

CONCLUSION

After careful consideration of the briefing and applicable law, the Court hereby DENIES the City of Dallas's Motion for Partial Summary Judgment and GRANTS the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning City of Dallas's NEPA Claims. The Court hereby DENIES the Texas Water Development Board's Motion for Partial Summary Judgment and GRANTS the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning the Texas Water Development Board's NEPA Claims. The Court DENIES in PART and DENIES as MOOT in PART the Federal Defendants' Motion to Strike Plaintiffs' Extra-Record Materials. The Court GRANTS the Texas Conservation Alliance's Motion for Leave to File Amicus Brief and the Amicus Brief. The Court GRANTS Friends of the Neches River's and Houston Audobon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief. The Court GRANTS Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment. The Clerk's Office is hereby instructed to file Docket Numbers 106-3, 111-2 and 123-1 in accordance with this Order.

It is SO ORDERED, this 30th day of June 2008.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CITY OF DALLAS, TEXAS,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
vs.	§	3:07-CV-0060-P
	§	
H. DALE HALL, et al.,	§	
	§	
Defendants.	§	
	§	(Consolidated with:
	§	
THE TEXAS WATER DEVELOPMENT BOARD,	§	
	§	
Plaintiff,	§	Civ. Action No.
	§	3:07-CV-0213-P)
vs.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	§	
	§	
Defendants.	§	

PARTIAL FINAL JUDGMENT

On June 30, 2008, the Court entered a Memorandum Opinion and Order (Doc. 131) disposing of all claims in

this case raised by the City of Dallas and the Texas Water Development Board (collectively, "Plaintiffs") under the National Environmental policy Act ("the NEPA claims").

The following additional claims for relief remain unadjudicated: (i) the Texas Water Development Board's Eighth Claim for Relief — *Ultra Vires* Action (seeking to set aside the Deed of Conservation Easement and asking for a declaration that the Federal Defendants have no interest in the one-acre tract), (ii) the City of Dallas's Count VIII (*Ultra Vires* Acceptance of One Acre Conservation Easement), and (iii) the City of Dallas's Count IX (Violation of Fish and Wildlife Act and the APA – Abuse of Discretion in Acceptance of One Acre Conservation Easement).

Having considered Plaintiffs' Unopposed Motion for Final Judgment under Rule 54(b), the Court specifically certifies there is no just reason to delay the entry of a final judgment with respect to Plaintiffs' NEPA claims.

Therefore, the Court hereby orders that Plaintiffs TAKE NOTHING by their NEPA claims.

The Court hereby denies all relief with respect to Plaintiffs' NEPA claims.

The Court hereby directs the District Clerk to enter this, a FINAL JUDGMENT, as to the NEPA claims brought by Plaintiffs.

SO ORDERED, this 28th day of July 2008.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP - 4 2008
CLERK, U.S. DISTRICT COURT
By /s/
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

THE CITY OF DALLAS, TEXAS	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
vs.	§	3:07-CV-0060-P
	§	
H. DALE HALL, et al.,	§	
	§	
Defendants.	§	
	§	(Consolidated with:
THE TEXAS WATER DEVELOPMENT BOARD,	§	
	§	
Plaintiff,	§	Civil Action No.
	§	3:07-CV-0213-P)
vs.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	§	
	§	
Defendants.	§	

AMENDED PARTIAL FINAL JUDGMENT

On July 28, 2008, this Court entered a Partial Final Judgment (Doc. 144) based upon the City of Dallas' and the Texas Water Development Board's (collectively, "Plaintiffs") Unopposed Motion for Final Judgment under Rule 54(b) (Doc. 142). Plaintiffs and Federal Defendants now file a Joint Motion for Amendment of the Partial Final Judgment under Rule 54(b) asking this Court to amend that judgment. The Court specifically certifies there is no just reason to delay the entry of an amended final judgment with respect to the Plaintiffs' additional identified claims dismissed by this Court's Memorandum Opinion and Order of October 24, 2007 (Doc. 83).

The following additional claims for relief still remain unadjudicated: (i) the Texas Water Development Board's Eighth Claim for Relief in its Second Amended Complaint filed November 9, 2007 (Doc. 86) - *Ultra Vires* Action (seeking to set aside the Deed of Conservation Easement and asking for a declaration that the Federal Defendants have no interest in the one-acre tract), (ii) the City of Dallas's Count VIII in its Second Amended Complaint filed November 7, 2007 (Doc. 85) - *Ultra Vires* Acceptance of One Acre Conservation Easement, and (iii) the City of Dallas's Count IX - Violation of Fish and Wildlife Act and the APA - Abuse of Discretion in Acceptance of One Acre Conservation Easement.

Therefore, the Court hereby orders that Plaintiffs TAKE NOTHING by their following claims and hereby denies all relief with respect to all of the following:

(i) the Plaintiffs' National Environmental Policy Act ("NEPA") claims;

(ii) the TWDB's Sixth Claim for Relief in its Amended Complaint filed March 8, 2007 (Doc. 24) Violation of Executive Orders;

(iii) the TWDB's Seventh Claim for Relief in its First Amended complaint, *id.*—Invalid Conservation Easement;

(iv) the City's Count VIII Claim for Relief in its First Amended Complaint filed February 14, 2007 (Doc. 13) - Violation of NEPA and the Administrative Procedure Act ("APA") - Executive Order Nos. 13,132 and 13,352;

(v) the City's Count IX and X - Violation of National Wildlife Refuge System Administration Act ("NWRSAA") and the APA; and

(vi) the City's Count XII - Violation of the Tenth Amendment of the U.S. Constitution – Absence of Authority under the Commerce Clause.

The Court hereby directs the District Clerk to enter this, an AMENDED PARTIAL FINAL JUDGMENT, as to the aforementioned claims brought by Plaintiffs.

SO ORDERED, this /s/ 4th day of September 2008.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit
FILED
March 12, 2009

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10890

CITY OF DALLAS, TEXAS

Plaintiff-Appellant

v.

H. DALE HALL, ET AL.

Defendant-Appellee

and

TEXAS WATER DEVELOPMENT BOARD

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

Defendants-Appellees

Appeal from the United States United States District Court for the Northern District of Texas

Before SMITH and SOUTHWICK, Circuit Judges, and ENGELHARDT, District Judge.*

No. 08-10890

KURT D. ENGELHARDT, District Judge:

After preparing an Environmental Assessment ("EA") of the proposed Neches Wildlife Refuge in East Texas, the U.S. Fish & Wildlife Service ("FWS") announced its Finding of No Significant Impact ("FONSI"), obviating the need to prepare an Environmental Impact Statement ("EIS"). FWS then set an acquisition boundary for the refuge and accepted a conservation easement within that boundary. These actions precluded a reservoir the City of Dallas ("City") and the Texas Water Development Board ("TWDB") had proposed for the same site. The City and TWDB sued in federal district court claiming that the EA that FWS prepared was flawed, that under the National Environmental Policy Act ("NEPA") the agency was required to prepare an EIS, and that the establishment of the refuge violated the Tenth Amendment. The district court dismissed several of the Appellants' claims and granted FWS' motion for summary judgment on others. We AFFIRM.

*District Judge of the Eastern District of Louisiana, sitting by designation.

I. BACKGROUND

In 1961, the State of Texas first identified a site along the Upper Neches River in Anderson and Cherokee Counties as a potential reservoir to serve the growing Dallas/Ft. Worth Metroplex. Dubbed the Fastrill Reservoir, the site was again included in a state water agency resources plan in 1984, and in the 1997and 2001 regional water plans issued by TWDB. The City and TWDB's plan envisioned constructing the reservoir in 2050 and tapping it in 2060. There is nothing in the record prior to 2005 that indicates that the City or TWDB took any steps to develop the site beyond including it–among other possible reservoir sites–in regularly updated planning documents.

In 1985, FWS identified the same site as a possible wildlife refuge, since its native bottomland hardwood forest and wetlands provide an important wintering habitat for migrating waterfowl. That year, FWS listed the site as high-priority for protection. FWS approved a preliminary refuge proposal in 1988 and prepared a draft EA, but put the project aside for lack of funding. The project was revived in 2003 and the agency initiated public comment in June 2004. Public workshops were held in July 2004 and FWS made a presentation to the regional water planning group in October of that year. Another EA was prepared, which listed three alternatives: no action, the recommended 25,281-acre configuration, and a narrower 15,294-acre configuration. The EA referenced the reservoir proposal and noted that both the larger and smaller refuge configurations would prevent the reservoir from being built. The EA was distributed to public officials and interested groups, open meetings were held in

May 2005, and it was open for public review and comment for two weeks that same month. More than 1,600 comments were received, but the EA was not revised, and a "final" EA was not issued. On July 28, 2005, FWS concluded that an EIS was unnecessary and prepared a FONSI.

By early 2005, the City was aware that FWS had revived the refuge proposal. On March 9, 2005, the Dallas City Council passed a resolution expressing a desire to work with FWS on a plan that would allow the reservoir and the refuge to coexist and authorizing a feasibility study. On August 16th, the Texas legislature designated the Fastrill Reservoir as a "critical resource," and the January 2006 regional water plan recommended building the reservoir as part of its water management strategy. Meetings were also held between the director of FWS and City representatives to discuss alternative sites for the refuge, and state and FWS representatives continued to communicate through the first half of 2006 about alternative plans that would allow a refuge and a reservoir to coexist. The City and TWDB scheduled–though did not actually begin–a series of engineering and environmental studies. By June 11, 2006, the day FWS designated an "acquisition boundary" for the refuge encompassing the larger 25,281-acre site, the feasibility study was not completed nor had Appellants taken any concrete steps toward planning the reservoir, such as applying for permits. Accompanying the designation was a Conceptual Management Plan outlining how land within the boundary would be acquired. The Neches Wildlife Refuge was set to come into existence when FWS, by purchase or donation, took title to or an interest in property within the acquisition boundary. On

August 23, 2006, FWS accepted a one-acre conservation easement from a landowner within the acquisition boundary.

TWDB and the City filed the instant suits on January 10, 2007, arguing *inter alia* that the EA was flawed, that FWS should have prepared an EIS, and that the refuge violated the Tenth Amendment. On October 24, 2007, the district court dismissed five of the City's claims, including the constitutional claim, and two of TWDB's claims, under Rule 12(b)(6). The parties filed cross-motions for partial summary judgment on the NEPA claims, and on June 30, 2008, the district court denied the Appellants' motions and granted FWS's motion. Relying heavily on *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992), the district court held that an EIS was not required because the establishment of the acquisition boundary did not cause any change in the physical environment. The court concluded that the refuge's effect on the City's water supply was speculative and not within the scope of NEPA. The court also found that the EA considered a reasonable range of alternatives and evaluated the necessary information. The City and TWDB moved for an injunction pending appeal and for entry of final judgment, which were granted on July 28, 2008. The parties subsequently filed a joint motion to amend the judgment, which was granted on September 4, 2008. Notice of appeal was filed on September 8, 2008, and the appeal was expedited on September 22, 2008.

II. DISCUSSION

A. Standard of Review

We review the district court's grant of summary judgment *de novo*. *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002). The court may only set aside an agency's decision not to prepare an EIS where a plaintiff establishes that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-76 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). Under this highly deferential standard of review, a reviewing court has the least latitude in finding grounds for reversal. *Sabine River*, 951 F.2d at 678. Courts may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency. But "[i]n conducting our NEPA inquiry, we must 'make a searching and careful inquiry into the facts and review whether the decision . . . was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *Marsh*, 490 U.S. at 378 (citation omitted).

We review *de novo* a district court's dismissal pursuant to Rule 12(b)(6). *Ballard v. Wall*, 413 F.3d 510, 514 (5th Cir. 2005). "All of the plaintiff's allegations must be accepted as true, and the dismissal will be affirmed only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Id.* at 514-15 (internal quotation omitted). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to

prevent a motion to dismiss." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quotation omitted).

B. Sufficiency of the Environmental Assessment

NEPA does not require federal agencies to favor an environmentally preferable course of action, but rather requires that they take a "hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe*, 427 U.S. at 410 n.21). The statute requires "all agencies of the Federal Government . . . [to] include [an EIS] in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). An EIS is not necessary when the federal action is not major or does not have a "significant impact on the environment." *Sabine River*, 951 F.2d at 677. To determine whether an EIS is necessary, an agency will perform an EA. *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994); 40 C.F.R. § 1508.9(a)(1) (defining an EA as a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact"). An EA is "a rough cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement–which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project–is necessary." *Sabine River*, 951 F.2d at 677 (citing *Cronin v. U.S. Dep't. of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990)). An EA will result in a finding that an EIS is necessary or in a FONSI, indicating that no further study of environmental impacts is warranted. *La.*

Crawfish Producers Ass'n-West v. Rowan, 463 F.3d 352, 356 (5th Cir. 2006).

1. Failure to Consider Alternatives

An EA must discuss alternatives to the planned action, but need not discuss all proposed alternatives. *See* 40 C.F.R. § 1508.9(b) (assessment "[s]hall include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted"); *see also La. Crawfish Ass'n*, 463 F.3d at 355 (NEPA "does not require that all proposed alternatives, no matter their merit, be discussed in the EA."). "[T]he range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial." *Sierra Club*, 38[illegible] F.3d at 803; *see also Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960 (7th Cir. 2003) ("When . . . an agency makes an informed decision that the environmental impact will be small . . . a less extensive search [for alternatives] is required."). The rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious. *See Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 177 (5th Cir. 2000).

The EA in this case noted that "the area under consideration was identified in a preliminary study by the Texas Water Plan as an area with the potential for development as a reservoir . . . ." It also noted that the City was considering a feasibility study of the reservoir. It analyzed the effects of three different alternatives (no action, a larger refuge, and a smaller refuge) along multiple lines such as climate and air quality, water resources, vegetation, land use, and cultural resources. In

each instance, the EA acknowledged and attempted to analyze the effect the alternative would have on the reservoir proposal. The EA also analyzed the cumulative impact of the refuge in conjunction with other "past, present, and reasonably foreseeable future actions," including the reservoir.

Appellants argue that FWS was required to consider an alternative that would allow the refuge and the reservoir to coexist. In the EA, however, FWS noted that it was unable to evaluate fully any such dual proposal, since plans for the reservoir were "speculative in the short-term, . . . not definitive in scope or purpose, and . . . far beyond the planning horizon for the refuge proposal (i.e., 20 years)." Additionally, after several weeks of consultation between staff at FWS, the City, and TWDB, a TWDB biologist admitted to the director of TWDB that "an alternative site that is equal to or bigger and/or better than the North Neches site has not yet been identified." The director echoed this assessment in a letter to FWS. Only after the closure of the public comment period and the drafting of the FONSI did FWS receive a proposal for alternative refuge sites. The alternatives included four other sites that Appellants claimed were of greater environmental value, since there was more bottomland hardwood extant at these sites. Each of these alternatives, however, envisioned building the Fastrill Reservoir and the resulting inundation of the Upper Neches area, with destruction of vegetation in that region. The record reveals no alternative that allowed construction of the reservoir *and* served FWS' goal of preserving the bottomlands and wetlands of the Upper Neches. Under the circumstances, and especially given that FWS concluded that the project had no significant

environmental impact, *see Sierra Club*, 38 F.3d at 803, this range of alternatives was reasonable.

2. Failure to Consider Impacts

An EA must analyze both the direct and indirect effects of the proposed action that are "reasonably foreseeable," 42 U.S.C. § 4332(C)(ii); 40 C.F.R. §§ 1502.16(a) & (b); 40 C.F.R. § 1508.7, which we have defined as effects that are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). "Reasonable foreseeability" does not include "highly speculative harms" that "distort[ ] the decisionmaking process" by emphasizing consequences beyond those of "greatest concern to the public and of greatest relevance to the agency's decision." *Robertson*, 490 U.S. at 355-56 (internal quotation marks and citations omitted). "[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. Rather, a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action." *City of Shoreacres*, 420 F.3d at 452.

Appellants argue that FWS was required to analyze the effect of establishing the refuge on the City's water supply and urban planning process, given projected population growth. The cases cited by Appellants are inapposite, however, since they concern the effect of federal actions on *existing* water sources, not proposed water sources. *See Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (effect of port development runoff); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (effect of

industrial development runoff); *California v. Dep't of Transp.*, 260 F. Supp. 2d 969 (N.D. Cal. 2003) (effect of airport construction); *Simmons v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974) (effect of eliminating water source). Plaintiffs do not cite to any authority for the proposition that an agency must account for the effects on a municipal water supply of precluding a proposed but as-yet-nonexistent water source.

Further, the effects of establishing the refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas. The City and TWDB never committed to constructing the reservoir and may never have done so, or may have constructed a reservoir at another site. Besides including it in periodically updated planning documents, the City and TWDB have never taken any concrete steps toward constructing the reservoir, such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project. In fact, the City and TWDB have never even settled upon the exact position of the dam or footprint of the reservoir. Thus, the City and TWDB have never identified the precise role the reservoir–even if constructed and tapped in 2060–will play in supplying the region's future water needs. Further, the City argues that water shortages in the region will begin as early as 2010, yet the reservoir would not be tapped earlier than 2060. Given the uncertainty over whether the reservoir will be constructed and its impact on water supplies, and the long time frame for the project, the effects of establishing the refuge on water supplies are not concrete enough, nor

closely enough related to the federal action, to require that they be included in the EA.

3. Reliance on Old Data

Appellants argue that FWS relied upon old data in its EA. Properly analyzing the risks of an action requires an agency to use updated information or data; reliance on out-of-date or incomplete information may render the analysis of effects speculative and uncertain, warranting the preparation of an EIS. *See Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Service,* 373 F. Supp. 2d 1069, 1081 (E.D. Cal. 2004). In this case much of the data in the EA was lifted from the earlier EA prepared in 1988. The City and TWDB note that there has been degradation of the site and that a significant portion of the Upper Neches bottomland hardwoods have been cleared. However, the City and TWDB have not shown that this information was so flawed that it precluded assessment of reasonably foreseeable impacts. Nor is it clear how, in this case, additional information as to environmental degradation of the Upper Neches would cause FWS to conclude it should leave the site unprotected. In this sense, the instant case differs from those cited by Appellants, where additional or updated information was needed before a reasoned decision could be made as to whether to intrude on a site. *See, e.g., The Lands Council v. Powell,* 395 F.3d 1019, 1031 (9th Cir. 2005) (additional information on animal habitat needed before timber harvest could commence)[1]; *Idaho Sporting Congress v.*

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1 *Lands Council* also differs from the instant case in that it involved an EIS, which is by design a more comprehensive document than an EA.

Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (additional information on trout habitat needed before logging could commence), *overruled on different grounds, The Lands Council v. McNair*, 537 F.3d 981, 997 (9th Cir. 2008); *Klamath-Siskiyou Wildlands Ctr.*, 373 F. Supp. 2d at 1081 (additional information on owl population needed before logging could commence).

Undoubtedly, were a plaintiff to show that a site had become so degraded–for example, by substantial clearcutting of the bottomland hardwoods such that it would not support migrating waterfowl even if protected–such a showing may well render the decision to rely on older data arbitrary within the meaning of NEPA. No such showing has been made in this instance. Here, the use of older data in an EA–by definition a "rough cut, low-budget" assessment of environmental impacts on the way to determining whether an EIS is necessary, *see Sabine River*, 951 F.2d at 677–cannot be said to be unreasonable. Nor does the use of this data in this instance support forcing the agency to engage in a process likely, because of its lengthy timeline, to permit further environmental degradation of the site before a decision is reached.

4. The FWS Decision Making Process

Finally, the City and TWDB also argue that the decision making process FWS engaged in was a sham. Appellants point to several flaws: FWS's choice of a 20-year project horizon for analysis of impacts, its failure to coordinate with local and state planning agencies in violation of CEQ regulations, and its failure to publish a "final" EA. The record reveals that FWS engaged in an extensive process of public education and public comment

and even worked with officials from the City and TWDB to identify an alternative site that would allow the refuge and the reservoir to coexist. Emails between various FWS officials reveal nothing more than an appropriate advocacy for a favored agency alternative. In arguing that FWS was required to publish a "final" EA, Appellants cite only to non-binding internal policy memos and not to any binding regulation or statute. Appellants' assertion that FWS abused its discretion by failing to "coordinate" with the local, regional, and state water planning process falls short, since neither NEPA nor any of the other statutes the City or TWDB cite require an agency to insinuate itself into state planning processes in the manner suggested. Finally, Appellants fail to show that FWS's 20-year planning horizon was arbitrary and capricious under the circumstances. As the district court noted, "FWS must set some kind of time frame for its evaluations; it cannot have an interminable planning period." *City of Dallas, Tex. v. Hall*, 2008 WL 2622809, at *14 n.10 (N.D. Tex. June 30, 2008).

B. Requirement of an EIS

In arguing that an EIS was required, Appellants attempt to distinguish this case from *Sabine River*. In that case, strikingly similar to the present one, FWS set an acquisition boundary for a wildlife refuge on 3,800 acres in East Texas, and accepted a negative, no-development easement from a landowner inside the acquisition boundary. *See Sabine River*, 951 F.2d at 674-76. The designation precluded the construction of a proposed reservoir. *Id.* at 673. The reservoir was in the preliminary planning stage, and the state agency with jurisdiction over it had "obtained none of the necessary

federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the 300 thousand plus acre feet of water that the reservoir would generate each year." *Id.* We concluded that "the acquisition of a negative easement which by its terms prohibits any change in the *status quo* does not amount to 'major Federal action[ ] significantly affecting the quality of the human environment.' . . . The acquisition of a negative easement which prohibits development does not result in the requisite 'change' to the physical environment." *Id.* at 679-80 (citations omitted). The acceptance of such an easement is "tantamount to inaction," and thus the acceptance "did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS." *Id.* at 680. In the instant case, the district court properly set forth the factors to consider in applying *Sabine River:* whether the agency action (1) precludes any development of the land, (2) changes the character or function of the land, and (3) prohibits any change in the *status quo* of the land. *City of Dallas, Tex.*, 2008 WL 2622809 at *5.

The City argues that three independent authorities dictate that an EIS was required in this instance: FWS's own NEPA guidelines, the NEPA implementing regulations issued by the U.S. Department of the Interior ("DOI"), and the NEPA implementing regulations issued by the Council on Environmental Quality ("CEQ"). The FWS guidelines include a number of criteria to assist the agency in determining whether an EIS is needed. Among these are "increased safety or health hazards," 550 FW 3.3(B)(2)(e), and "[a]dverse effects on municipal, industrial, or agricultural water supply or quality . . . ," *id.* at 3.3(B)(2)(i). The City points to these guidelines and

argues that an EIS is required to weigh adequately the health and water supply effects of not building the reservoir. But these guidelines have no binding force. *See Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 229 (5th Cir. 2005) ("Generally, to be legally binding on an agency, its own publications must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.'") (citation omitted). When agency publications have not been promulgated pursuant to a specific grant of statutory authority, an agency's decision to analyze impacts by other methods is not automatically arbitrary and capricious. *Id.* at 230. These guidelines were not promulgated pursuant to law. Further, by their own terms, they are meant to *assist* in determining whether an EIS is necessary, not *dictate* when an EIS is necessary, and carefully note that whether any of the criteria triggers the need for an EIS depends in each instance on "the severity and duration of effects." FW 550 3.3(B)(2).

The DOI regulations the City points to are binding on the agency, but they do not mandate the preparation of an EIS in this case. In the regulations, among the "Major Actions Normally Requiring an EIS" are "major new refuge system units . . . which involve substantive conflicts over existing State and local land use [or] significant controversy over the environmental effects of the proposal." 62 Fed. Reg. 2375, 2382. The City argues that the refuge meets both these criteria. But by their own terms, the regulations "normally" require preparation of an EIS but do not dictate preparation in each case. Further, the regulations clearly envision that when, pursuant to an EA, the agency determines that an action will have no major environmental impacts, an EIS is not

required even when the action otherwise meets the criteria. *Id.* In this case, after preparing an EA the agency made a reasoned decision that there were no significant environmental effects.

More importantly, by their own terms the regulations only envision preparation of an EIS when there is a conflict with "existing" State and local land use or where there is "significant" controversy over environmental effects. In this case, while a feasibility study has been completed, the City and TWDB have taken no concrete steps to develop the reservoir (such as applying for permits), much less put any land to use. The development of an acquisition boundary does not conflict with existing State and local use, but merely with a potential future use. Further, the City and TWDB have been unable to show with any specificity the effects of setting the acquisition boundary. A controversy such as this one—over the highly speculative, uncertain effects of not building a particular reservoir—cannot be "significant" within the meaning of both the regulations and NEPA.

Similarly, while the CEQ regulations that the City points to are binding on federal agencies, *see Fritiofson v. Alexander,* 772 F.2d 1225, 1236 (5th Cir.1985), they do not mandate the preparation of an EIS in this case. The regulations merely require an agency to determine whether an action is one that normally requires an EIS. *See* 40 C.F.R. § 1501.4(a). If the agency determines that the action does not normally require an EIS, it then prepares an EA and makes a finding as to whether the proposed action has significant environmental impacts. *Id.* at 1501.4(b). In this case, as described above, FWS

properly prepared an EA and made a FONSI, as envisioned by the CEQ regulations.

TWDB also argues that the instant case is distinguishable from *Sabine River* because the refuge designation in this case will cause changes in the physical environment. As noted in the EA, FWS envisions removing non-native tree species in the refuge and reintroducing native hardwood and evergreen species. TWDB argues that this distinguishes the case from *Sabine River*, where there was no evidence that the refuge site would be changed in any way by the acceptance of an easement. *See Sabine River Auth. v. U.S. Dep't of the Interior*, 745 F. Supp. 388, 394 (E.D. Tex. 1990). However, as the district court noted in its order denying Appellants' motion for partial summary judgment, the action at issue here is the establishment of an acquisition boundary for the refuge. The establishment of that boundary does not effect any change in the physical environment, but merely authorizes the purchase of property from willing buyers or the acceptance of conservation easements. Once sufficient land is acquired, FWS will be required to comply with NEPA in formulating a Comprehensive Conservation Plan to guide refuge forest management. If changes in the physical environment are proposed in that plan, an EIS may be required. But the present federal action will have no significant physical effects such that an EIS is required.

As in *Sabine River*, where the acceptance of a negative, non-development easement was "tantamount to inaction," *Sabine River*, 951 F.2d at 680, setting an acquisition boundary for the refuge does not effect a change in the use or character of land or in the physical environment. Thus,

it is not a "major Federal action [] significantly affecting the quality of the human environment," 42 U.S.C.§ 4332(2), and no EIS is necessary under the requirements of NEPA.

C. Tenth Amendment Claims

Finally, Appellants argue that the establishment of the refuge is unconstitutional because it impermissibly intrudes on state sovereignty and violates the Property[2] and Necessary and Proper Clauses.[3] Before ruling we must determine precisely what, if any, issues are properly before us. In its amended complaint, the City alleged that there was not a sufficient nexus between the agency's action and interstate commerce, and that FWS violated the City's Tenth Amendment right to secure sufficient water supplies for future residents. In its brief before the district court, however, the City conceded that it could not challenge the constitutionality of the statutes allowing for acquisition of property. The City's brief also did not argue a constitutional right to secure water supplies, which the district court nonetheless characterized as "a spurious argument without legal basis." *City of Dallas, Tex. v. Hall*, 2007 WL 3125311, at *11 (N.D. Tex. October 24, 2007). Rather, the City asserted that FWS exceeded its authority under the Tenth Amendment when it established the acquisition boundary and accepted the conservation easement, because it did so for the purpose of commandeering the state's water planning process and thwarting the reservoir. Because these were not the

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2 U.S. CONST. art. 4, § 3, cl. 2.

3 U.S. CONST. art. 1, § 8, cl. 18.

allegations pleaded in the amended complaint, the district court declined to consider them on the motion to dismiss for failure to state a claim. The allegations in the amended complaint, not having been appealed, are waived.

In its brief before this court, the City revises its constitutional argument. In this iteration, the City argues that FWS, by establishing the refuge, has unconstitutionally invaded a traditional area of state sovereignty–water and land use planning–without clear authorization from Congress. Additionally, it argues that establishing the refuge violates the Tenth Amendment by running afoul of the Property and Necessary and Proper Clauses. These arguments bear only a passing resemblance to the City's arguments on the motion to dismiss, and none at all to its arguments in the amended complaint. Accordingly, these arguments are not properly presented and we decline to consider them. *See Singleton v. Wuff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Fed. Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the decisions of the district court.

Table 4D.1
Summary of Costs and Impacts of Major Potentially Feasible Strategies For Region C

Strategy	Potential (by patterns)	Potential Region C Supply (Acre-Feet per Year)	Region C Share of Capital Cost	Unit Cost for Region C ($/Ac-ft)		Reliability	Environmental Impacts	Agricultural/ Rural Impacts	Other Natural Resources	3rd Party Impacts	Key Water Quality Parameters	Consistency		Implementation Issues	Comments
				Pre-Amort.	Post-Amort.							Region	Other Entities		
Toledo Bend Reservoir	DWU, FWSWD, IRA, TRWD & UTRWD	67,000	$1,425,799,000	$1.36	$0.61	High	Medium	Low	Low	Medium Low	Low	Yes	Yes	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	Does not include energy for it's transmission to the region.
Gulf of Mexico	DWU, FWSWD, or TRWD	Unlimited (limited by 280,000 acre-feet per year)	$2,834,297,000	$2.27	$1.01	Medium	Medium Low	Low	Medium Low	Low	Medium	No	No	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	Does not include energy for it's transmission to the region. Capital Cost over $2B in excess of other supplies. Study is limited EIS.
Marvin Nichols Reservoir	DWU, Irving, FWSWD, TRWD and UTRWD	409,000	$1,810,700,000	$1.33	$0.77	High	High	High	Medium High	High	Medium	Yes	Yes	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	Does not include energy for it's transmission to the region.
Wright Patman - Down	DWU, Irving, MTWSWD, TRWD, and UTRWD	168,000	$1,011,222,000	$1.45	$0.58	High	Medium	Low	Medium	Medium	Medium Low	No (already)	No (already)	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	Does not include a 136,000 acre-feet per year in-lieu purchase.
Lake Texoma Into Yr Authorized (Raised)	DWU, TRWD, or UTRWD	250,000 (Cases for 113,000 acre-feet per year)	$1,115,000,000	$1.69	$0.33	High	Medium	Low	Medium Low	Medium Low	Medium	No (already)	N/A	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	
Lake Texoma Into Yr Authorized (Treatment)	DWU or TRWD	371,000 (Cases are for 113,000)	$821,400,000	$2.17	$1.03	High	Medium	Low	Medium	Medium Low	Medium	No (already)	N/A	Legislative EIT; Environmental issues with IRA/ACT; Transboundary issues with Louisiana	Delivery issues exist

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Table 6-3 Continued

Source	Potential Impediment(s)	Potential Region C Supply (Acre-Feet per Year)	Region C Share of Capital Cost	Unit Cost for Region C ($/kAF)		Reliability	Environmental Factors	Agricultural and Rural Impacts	Other Natural Resources	Key Water Quality Parameters	Combines by		Comments
				Per Acre-Ft.	Per 1,000 Gal.						Region	Other Basins	
Bois d'Arc Lake, Ray Roberts Lake/Lake Lewisville Dam A	DWU, KTMWD, & TWPD	290,000	$1,268,963,000 to $1,733,581,000	$3.84 to $5.43	$0.98 to $1.72	High	Low	Low	Low	Medium Low	No (Minimal)	Unknown	May be competing source to supply to other WUGs.
Lake Ringgold	DWU, KTMWD, & TWPD	200,000	$1,143,917,000 to $1,399,183,000	$3.72 to $5.83	$0.93 to $1.83	High	Low	Low	Low	Medium Low	No (Minimal)	Unknown	Requires contract with TRA. May be competing source to supply to other WUGs.
Cedron Groundwater (Nations County)	DWU, KTMWD, & TWPD	200,000	$1,050,819,000 to $1,399,389,000	$3.44 to $5.83	$1.04 to $1.81	High	Medium low	Medium	Medium	Medium	No (Minimal)	No breakdown	Assume 40,000 acre-ft/year Alpha. Capacity provided is assumed for 10,000 acre-ft.
TRWD 3rd Pipeline and Basin	TRWD	196,700	$606,547,000	$3.08	$0.01	Low	Low	Low	Low	Medium	Yes	N/A	Requires to be [illegible]
Wright Patman - Below Flood Pool	DWU, Lewisville, KTMWD, & TWPD	160,000	$533,859,000 to $1,015,239,000	$3.33 to $6.34	$1.43 to $1.95	High	Medium	Low	Medium Low	Medium Low	Yes	No breakdown	Requires TWP, DWU, Alpha, LEWCO and use of existing water rights.
Oklahoma Wave	DWU, Irving, KTMWD, TRWD, cable UTRWD	160,000 or more (more based on 110,000)	$477,214,000	$3.10	$0.47	High	Low	Low	Low	Medium Low	Yes	N/A	Oklahoma has restrictions for export of water out of state. May require an IBT.
Lower Bois d'Arc Creek Reservoir	KTMWD	135,000	$599,300,000	$6.57	$1.14	High	Medium High	High	Medium	Low	Yes	N/A	Requires water rights and IBT.
Lake Palo Duro/Lake	DWU	132,000	$565,918,000	$5.94	$1.17	High	Low	Low	Low	Low	Yes	Yes	Requires to [illegible].
Orange Panhandle Lake (Texas)	DWU, KTMWD, cable UTRWD	115,000	$363,722,000 to $563,551,000	$3.81 to $5.90	$0.23 to $1.27	High	Medium High	Medium High	Medium	Medium	Low	No (Minimal)	No breakdown	Costs are for KTMWD and DWU.
Lake Palestine	DWU	111,400*	$614,443,000	$5.66	$0.23	High	Low	Low	Low	Medium Low	Low	Yes	DWU has IBT permit.

Table 4.9.3 Continued

Strategy	Permitted Supplier(s)	Potential Region C Supply (Acre-Feet per Year)	Region C Share of Capital Cost	Unit Cost for Region C (2012$)		Reliability	Environmental Flows	Agricultural/ Rural Impacts	Other Natural Resources	3rd Party Impacts	Key Water Quality Parameters	Combining		Implementation Issues	Other Info
				Avg. Annual	Per Acre-Foot							Supplies	Other Benefits		
New Lake Truscott (Brazos)	WTMWD	118,000	$301,210,000	$5.56	$5.11	High	Medium Low	Low	Medium Low	Low	Medium	Yes	N/A	Requires EIS, state water rights and interstate negotiations with USACE.	WTMWD has option for water rights
Lake Pauline	BWU	112,160	$186,170,000	$1.40	$2.27	High	High	Medium	Medium High	Medium	Low	Yes	Unknown	Requires new water rights and EIS.	
Oyster Parkdale Lake (Brazos)	WTMWD and/or UTMWD	104,480	$402,070,000	$3.24	$5.29	High	Medium High	Medium High	Medium	Medium	Low	No (observed)	Per beneficiaries	Requires new water rights and EIS.	
Lake Tyrone Expansion	WTMWD	118,000	$164,610,000	$1.99	$3.53	High	Medium	Low	Medium	Medium Low	Medium	No (observed)	N/A	Requires EIS, state water rights and new USACE permit for dam and inundation. New permit.	Delivery assumed mean.
New Point Storm Option	WTMWD	102,000	$208,770,000	$5.70	$3.11	High	Low	Low	Low	Low	Medium	Yes	N/A		
Wright Patman Lake - Treadaway	DWU, Irving, WTMWD, or TRWD	100,000	$429,170,000 to $576,170,000	$11.79 to $15.31	$8.61 to $9.77	High	Low	Low	Low	Medium Low	Medium Low	No (observed)	Per beneficiaries		
Cooper/Wright Groundwater (Delta County and vicinity)	DWU or WTMWD	100,000	$198,400,000 to $377,410,000	$3.64 to $6.93	$1.31 to $1.58	High	Medium	Medium	Medium High	Medium	Low	No (observed)	N/A	Requires EIS, state water rights and new USACE permit for dam and inundation. Groundwater use may be subject to MAG.	
Cypress Basin Supplies (Lake O' the Pines)	DWU, WTMWD, or TRWD	81,600	$207,150,000 to $446,650,000	$4.24 to $7.27	$2.55 to $5.70	High	Low	Low	Low	Low	Low to Medium	No (observed)	Per beneficiaries	Requires EIS, state water rights, and interstate negotiations with ANRA/OTA.	
Bolivar Peninsula with DWU Lake	DWU and UTMWD	79,200	$0	$0.10	$0.14	High	Low	Low	Medium Low	Low	Low	Yes	N/A	Requires new water rights and EIS.	
Sandbranch (Little Bay Watershed) Reuse	BWU	47,333	$200,310,000	$9.91	$9.31	High	Low	Low	Medium Low	Low	Medium	Yes	N/A	Requires new water rights and EIS.	

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Table 4D.3, Continued

Strategy	Potential Supplier(s)	Potential Region C Supply (Acre-Feet per Year)	Region C Share of Capital Cost	Unit Cost for Region C ($/kgal)		Reliability	Environmental Factors	Agricultural/ Rural Impacts	Other Natural Resources	3rd Party Impacts	Key Water Quality Parameters	Consistency with:		Implementation Issues	Comments
				Pre-Amort.	Post-Amort.							Regulations	Other Realities		
Lower Bois d'Arc Lake Recon	DWU	47,253	$191,459,000	$0.78	$0.11	High	Low	Low	Medium Low	Low	Medium	Yes	N/A	May require water right permit.	
Tehuacana Reservoir	TRWD	56,800	$311,820,000	$3.31	$0.35	High	Medium High	Medium High	Medium	Medium	Low	No (alternate)	N/A	Requires new water rights permit.	
Lake Ralph Hall and Reuse	UTRWD	50,740	$211,150,000	$1.10	$0.17	High	Medium high	Medium	Medium	Medium	Medium	Yes	N/A	Requires new water right and IBT.	
Lake Columbia	DWU	33,800	$223,700,000	$1.61	$0.29	High	Medium high	Medium	Medium	Medium	Medium	No (alternate)	Yes	Requires contract with ANRA and IBT.	

(Note: a. DWU has a contract for 114,337 acre-feet per year for water from Lake Palestine. Based on the firm yield of the reservoir, the estimated amount of supply available to DWU in 2020 is 111,460 acre-feet per year

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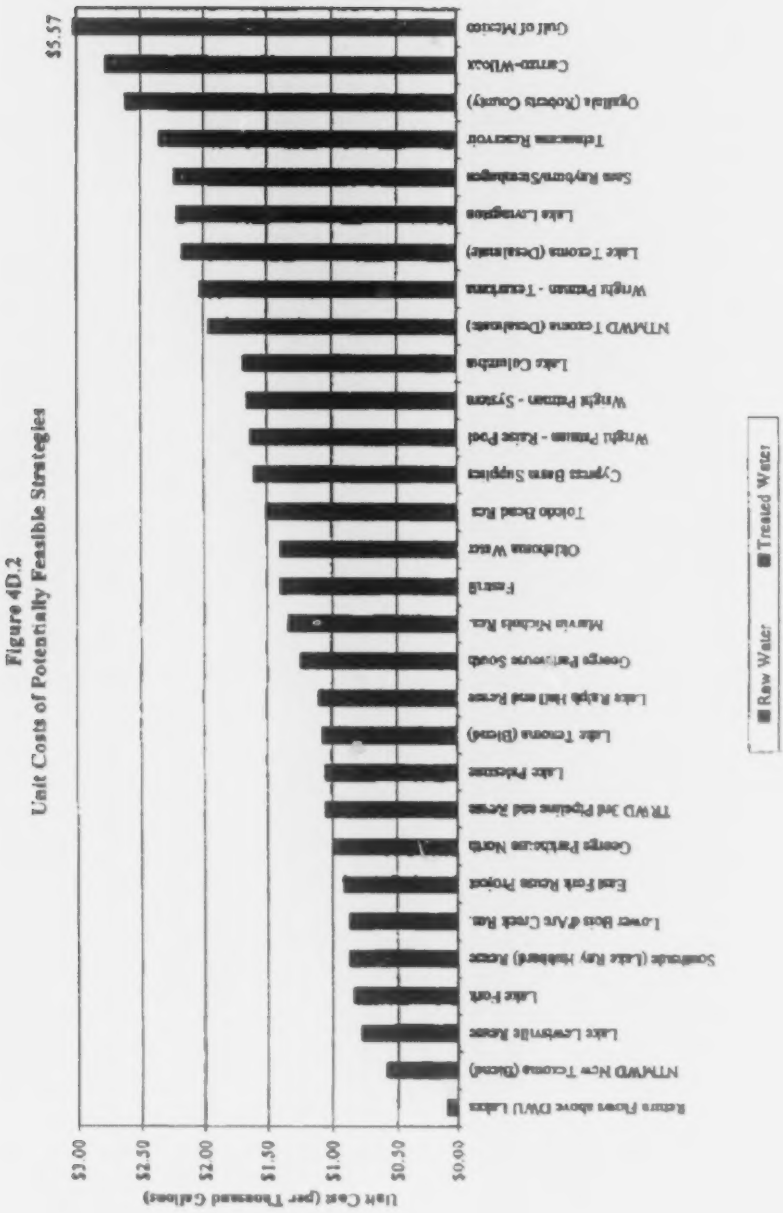
Figure 4D.2
Unit Costs of Potentially Feasible Strategies
Unit Cost (per Thousand Gallons)
$0.00
$0.50
$1.00
$1.50
$2.00
$2.50
$3.00
$5.57
Raw Water
Treated Water
Return Flows above DWU Lakes
NTMWD New Terrell (Diesel)
Lake Lavon Reuse
Lake Fork
Southside (Lake Ray Hubbard) Reuse
Lower Bois d'Arc Creek Res.
East Fork Raw Project
George Parkhouse North
TRWD 3rd Pipeline and Reuse
Lake Palestine
Lake Terrell (Diesel)
Lake Ralph Hall and Reuse
George Parkhouse South
Marvin Nichols Res.
Ferris
Oklahoma Water
Toledo Bend Res
Cypress Basin Supplies
Wright Patman - Raise Pool
Wright Patman - System
Lake Columbia
NTMWD Terrell (Desalination)
Wright Patman - Texarkana
Lake Texoma (Desalination)
Lake Livingston
Sam Rayburn/Steinhagen
Tehuacana Reservoir
Ogallala (Roberts County)
Carrizo-Wilcox
Gulf of Mexico

TWDB 00344

CODE OF FEDERAL REGULATIONS
TITLE 40. PROTECTION OF ENVIRONMENT
CHAPTER V. COUNCIL ON ENVIRONMENTAL QUALITY
PART 1506. OTHER REQUIREMENTS OF NEPA

§ 1506.2 Elimination of duplication with State and local procedures

. . . .

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

CODE OF FEDERAL REGULATIONS
TITLE 40. PROTECTION OF ENVIRONMENT
CHAPTER V. COUNCIL ON ENVIRONMENTAL QUALITY
PART 1508. TERMINOLOGY AND INDEX

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

CODE OF FEDERAL REGULATIONS
TITLE 40. PROTECTION OF ENVIRONMENT
CHAPTER V. COUNCIL ON ENVIRONMENTAL QUALITY
PART 1508. TERMINOLOGY AND INDEX

§ 1508.18 Major Federal Action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

CODE OF FEDERAL REGULATIONS
TITLE 40. PROTECTION OF ENVIRONMENT
CHAPTER V. COUNCIL ON ENVIRONMENTAL QUALITY
PART 1508. TERMINOLOGY AND INDEX

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

OPPOSITION BRIEF

150

(2) (3) APR 4 2010

Nos. 08-1520 and 08-1524

In the Supreme Court of the United States

CITY OF DALLAS, TEXAS, PETITIONER

v.

ROWAN W. GOULD, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

TEXAS WATER DEVELOPMENT BOARD, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States Fish and Wildlife Service's environmental assessment and finding of no significant environmental impact, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, with respect to the Service's designation of boundaries for a new National Wildlife Refuge, were not arbitrary and capricious.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 562 F.3d 712. The opinion of the district court (Pet. App. 21a-59a) is unreported.[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and petition appendix in No. 08-1520.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2009. The petitions for a writ of certiorari were filed on June 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public about those effects. 42 U.S.C. 4332(2)(C). Pursuant to NEPA and its implementing regulations, the United States Fish and Wildlife Service (FWS) prepared an environmental assessment of the environmental impact of establishing the Neches Wildlife Refuge along the Upper Neches River in Texas, and concluded that no significant environmental impact would arise, obviating the need to undertake a more detailed environmental impact statement. Petitioners challenged that decision as arbitrary and capricious. The district court granted FWS's motion for summary judgment and its motion to dismiss petitioners' NEPA claims. Pet. App. 21a-59a. The court of appeals affirmed. *Id.* at 1a-20a.

1. a. The Secretary of the Interior, through FWS, is charged with administering the National Wildlife Refuge System (System). 16 U.S.C. 668dd(a)(1). The System's purpose is to establish and "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. 668dd(a)(2). In administering the System, the Secretary is required to,

among other things, "plan and direct the continued growth of the System in a manner that is best designed to accomplish [its] mission," and "to contribute to the conservation of the ecosystems of the United States." 16 U.S.C. 668dd(a)(4)(C).

b. Under NEPA, whenever an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," it must prepare a detailed statement on the environmental impact of the proposed action, termed an environmental impact statement (EIS). 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 C.F.R. 1500.3; *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979). The CEQ regulations allow an agency to comply with NEPA by preparing a more limited document, known as an environmental assessment (EA), in order to determine whether a full EIS is necessary. See 40 C.F.R. 1501.3, 1501.4. An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. 1508.9(a) and (a)(1). If the agency determines on the basis of the EA that an EIS is not required, then it must issue a "finding of no significant impact," which is a document "briefly presenting" the reasons that the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.4(e), 1508.13.

NEPA does not mandate particular substantive results, but instead simply prescribes the necessary process to ensure that agencies are fully informed with respect to the environmental consequences of their proposed projects. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989); *Vermont*

Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 558 (1978). "[I]nherent" in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider every conceivable environmental effect, if doing so would be of little value to the decision-making process. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767-768 (2004); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989). Thus, an agency must consider an environmental effect of a proposed major federal action only if there is "a reasonably close causal relationship between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (internal quotation marks omitted). This Court has "analogized this requirement to the familiar doctrine of proximate cause from tort law." *Ibid.*

2. In 1961, the State of Texas identified the Upper Neches River area as a potential site on which to build a water-supply reservoir, known as the Fastrill Reservoir. Pet. App. 2a. For more than forty years, petitioners took no substantial steps towards planning, analyzing or building the reservoir, but periodically listed the site in state and local water plans as one of a number of potentially suitable reservoir sites. *Id.* at 2a-3a. When mentioned, the reservoir was described as potentially being constructed in 2050 and tapped in 2060. *Id.* at 2a, 37a.

In 1985, FWS identified the Upper Neches River area as an ecologically important bottomland hardwood habitat, and labeled the site as a high priority for protection. Pet. App. 2a-3a. The bottomland ecosystem supports a diverse array of plants and animals, and contains important wintering habitats for various waterfowl species. Gov't R.E. 3518-3519. FWS prepared a preliminary refuge proposal in 1988 and subsequently pre-

pared, but did not publish, a draft EA. Pet. App. 3a. FWS did not proceed with the proposal at that time largely because of a lack of funding. *Ibid.*

In 2003, FWS reactivated the project because of large-scale timber divestment occurring along the Neches River. Gov't C.A Br. 10. In June 2004, FWS officially introduced to the public the study for the proposed refuge. *Ibid.* FWS held public workshops in July 2004 and made a presentation about the project to the East Texas Regional Water Planning Group and other interested members of the public in October 2004. Pet. App. 3a, 57a.

With information generated from the study phase, FWS prepared an EA addressing the potential impacts of the proposed project, and also prepared land protection and concept management plans. The EA evaluated three alternatives, including: (1) a "no action" alternative; (2) the recommended 25,281-acre configuration; and (3) a narrower 15,294-acre configuration. Pet. App. 3a. The EA acknowledged the reservoir proposal, and noted that only the no-action alternative would preserve the possibility that the reservoir could be built, because the reservoir could not be constructed on land designated as a wildlife refuge absent congressional action. *Id.* at 3a, 42a; Gov't R.E. 3539, 3543. But because no feasibility study had been conducted and the precise location of the reservoir was undecided, the EA concluded that the reservoir project was speculative, and that it was impossible to meaningfully assess whether and how the refuge and reservoir plans might interface.[2] Pet. App. 42a; Gov't R.E. 3534.

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[2] In March 2005, having learned of FWS's renewed consideration of the refuge site, the City had commissioned a feasibility study, but it was not yet complete. Pet. App. 3a; Gov't C.A. Br. 10, 13-14.

In May 2005, FWS distributed the EA to public officials and interested groups and held two public hearings. Pet. App. 3a, 57a. Petitioners were invited to participate in the comment process and meetings, but they did not submit any proposals for alternative refuge sites or for developing both the refuge and the reservoir. *Id.* at 55a, 57a. FWS received more than 1,600 comments on the proposal, the majority of which favored establishment of the Refuge. *Id.* at 3a, 57a; Gov't C.A. Br. 12. FWS responded to comments from governmental agencies, including petitioners, regarding the future prospects for a reservoir within the boundaries of the proposed Refuge, Pet. App. 57a, and pointed out that if the Refuge was established, state officials could request that Congress authorize the Secretary to take the necessary steps to allow the construction of the reservoir. Gov't C.A. Br. 12. On July 28, 2005, FWS determined that an EIS was unnecessary and issued a Finding of No Significant Impact (FONSI). Pet. App. 3a.

In August 2005, shortly after FWS issued the FONSI, the Texas legislature designated the reservoir a "critical resource." Pet. App. 3a-4a. Throughout early 2006, FWS repeatedly met with representatives of the City of Dallas (City) and other entities to determine whether an alternative refuge site of equal or greater ecological value could be identified. *Id.* at 4a.

FWS set a June 1, 2006, deadline for its decision whether to designate the area as a wildlife refuge. Pet. App. 54a. At that point, the City's feasibility study had not yet been completed, and no concrete steps toward development of the reservoir, such as applying for permits, had been taken. *Id.* at 4a. Moreover, the Director of the Texas Parks and Wildlife Department had informed FWS that no viable alternative refuge site had

been identified. Gov't C.A. Br. 14. FWS issued its final decision approving the 25,281-acre Refuge boundary on June 11, 2006, and shortly thereafter accepted a conservation easement from a landowner within the acquisition boundary. *Id.* at 4a; Gov't C.A. Br. 14.

3. In January 2007, petitioners filed suit against respondents in the United States District Court for the Northern District of Texas, alleging, *inter alia*, that FWS's EA was insufficient and its decision not to undertake an EIS was arbitrary and capricious, in violation of NEPA. Pet. App. 4a. The district court granted partial summary judgment to FWS, rejecting petitioners' assertions that FWS had failed adequately to consider the impact of its refuge designation on the prospects for a reservoir, had failed to consider alternative proposals, and had relied on outdated data. *Id.* at 21a-59a.

4. The court of appeals affirmed. Pet. App. 1a-20a. Reviewing the sufficiency of FWS's EA under the arbitrary-and-capricious standard, see *Public Citizen*, 541 U.S. at 763, the court first found that FWS had not acted arbitrarily and capriciously in declining to analyze the potential effects of the refuge designation on future water supplies, Pet. App. 5a-6a, 10a-11a. In view of the uncertainty about whether the reservoir would ever have been constructed and its role in supplying the region's future water needs, the court held that the refuge designation could not be considered the proximate cause of any effect on water supplies. *Id.* at 6a-9a. The court also concluded that the EA considered an adequate range of alternatives, and that in any event, petitioners failed to proffer viable alternative proposals to FWS during the comment period and the subsequent discussions. *Id.* at 9a-10a. The court also rejected petitioners' contention that FWS arbitrarily relied on outdated data

that were insufficient to permit a reasoned decision, *id.* at 11a-13a, and upheld FWS's choice of a 20-year time horizon as reasonable, *id.* at 13a-14a.

Finally, the court upheld FWS's decision not to undertake an EIS as not arbitrary and capricious in view of FWS's "reasoned decision," in its EA, "that there were no significant environmental effects." Pet. App. 17a. The court also rejected the Texas Water Development Board's (TWDB) argument that the refuge designation itself would have significant physical effects on the environment, noting that the designation itself would not change the physical attributes or the maintenance of the land. *Id.* at 18a-19a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992)).

ARGUMENT

Petitioners renew their contention that FWS acted arbitrarily and capriciously in crafting its EA, and in concluding that the refuge designation would have no significant environmental impact. The court of appeals correctly rejected petitioners' arguments, and its fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners first contend (Pet. 11-29; 08-1524 Pet. 23-31) that FWS's EA was insufficient because it failed to consider the effects on the state and city water supplies that might result from not building the reservoir, as well as effects on as-yet undetermined alternative sites where petitioners might in the future decide to build a reservoir.

a. The court of appeals correctly held that FWS was not required to analyze the refuge designation's poten-

tial effects on future water supplies and urban planning because any such effects would not be proximately caused by FWS's action. Pet. App. 9a-11a. Petitioners acknowledge (Pet. 12; 08-1524 Pet. 24) that FWS was required only to consider proximately related, reasonably foreseeable impacts of its action, see *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004), and they do not contend that the court of appeals did not apply this standard, see Pet. App. 9a. Rather, petitioners challenge the court of appeals' fact-bound conclusion that FWS permissibly determined that the reservoir-related effects were not reasonably foreseeable.

As FWS and the court of appeals found, the connection between FWS's establishment of the refuge boundary and the alleged effects on the City's water supply is far too attenuated to fall within NEPA's sphere. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 772-774 (1983). Petitioners "never committed to constructing the reservoir and may never have done so." Pet. App. 11a. Petitioners had not taken any concrete steps "such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project." *Ibid.* As a result, petitioners might have decided not to construct the reservoir for any number of reasons that would be unrelated to FWS's action—for instance, if eventual studies showed that the reservoir was impracticable. Reflecting the tentative nature of petitioners' plans, petitioners "never identified the precise role the reservoir—even if constructed and tapped in 2060—will play in supplying the region's" water. *Ibid.* NEPA does not require agencies to attempt to analyze effects that are susceptible to innumerable intervening occurrences that could break the causal

chain leading from the federal action at issue. See *Metropolitan Edison*, 460 U.S. at 772-774; *Public Citizen*, 541 U.S. at 767 (courts must draw a "manageable line" respecting causation).

TWDB also contends (08-1524 Pet. 24-27) that FWS was required to analyze a sweeping range of potential effects that allegedly might flow from not constructing the reservoir, including the environmental effects of constructing a reservoir on a different, as-yet-undetermined site. But the court of appeals correctly concluded that an analysis of the impact of establishing the refuge boundary on future decisions by others about what water sources to develop in the future, and the effects of such unknown decisions on future water supply problems in the region, could not be based on anything but conjecture. Pet. App. 11a. NEPA does not require agencies to engage in projections that would be too speculative to aid the decision-making process. See *Public Citizen*, 541 U.S. at 767 ("inherent in NEPA and its implementing regulations is a 'rule of reason'"); *Metropolitan Edison*, 460 U.S. at 776.

b. The City contends (Pet. 26-29) that the court of appeals' conclusion that the designation of the refuge would not proximately cause effects on future water supplies conflicts with this Court's decisions in *Public Citizen* and *Metropolitan Edison*. In *Public Citizen*, the Court upheld the agency's decision not to address in its EA the environmental effects of allowing Mexican trucks to drive into the United States, because the agency had "no ability categorically to prevent the cross-border operations of Mexican motor carriers." 541 U.S. at 768. Contrary to the City's contentions (Pet. 27), that conclusion does not mean, nor did this Court suggest, that an agency must invariably consider all effects

that it "has authority to create or prevent," even if those effects are not proximately related to the action at issue. See *Oregon Natural Res. Council Fund* v. *Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (agency should consider proximate effects it has authority to prevent). Rather, in emphasizing that NEPA is intended to impose a manageable, not unlimited, obligation to consider effects proximately caused by the proposed action, *Public Citizen* supports the court of appeals' decision. 541 U.S. at 767-768. *Metropolitan Edison*, 460 U.S. at 774, is to the same effect.

c. The City also argues (Pet. 11-12, 16-17) that the court's proximate-cause holding conflicts with decisions of other courts of appeals. The cases on which petitioners rely, however, simply applied the proximate-cause standard to distinguishable factual scenarios in which the relevant agency had failed to assess the effects of currently existing circumstances or virtually inevitable future actions, often in the context of the more detailed analysis necessary in an EIS. See *Oregon Natural Res. Council Fund* v. *Goodman*, 505 F.3d 884, 892-893 (9th Cir. 2007) (EIS for the expansion of a ski area must consider cumulative impacts in light of two other already-scheduled projects in the area); *Save Our Sonoran, Inc.* v. *Flowers*, 408 F.3d 1113, 1121-1123 (9th Cir. 2005) (agency analysis was artificially limited to a portion of the planned development project); *Kern* v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072-1073, 1075 (9th Cir. 2002) (addressing agency's failure to consider effect of timber sales on spread of fungus in surrounding areas); *Oregon Natural Res. Council* v. *Marsh*, 832 F.2d 1489, 1498 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 360 (1989) (EIS did not adequately consider proposed dam's impact in conjunction with existing dams in

the area); *Sierra Club* v. *Marsh*, 769 F.2d 868, 872, 878 (1st Cir. 1985) (NEPA analysis must consider effects of building a cargo port and causeway on an island in light of second planned phase of industrial development, which consisted of detailed plans and which was virtually certain to occur); *Scientists' Inst. for Pub. Info., Inc.* v. *AEC*, 481 F.2d 1079, 1085-1093 (D.C. Cir. 1973) (rejecting argument that NEPA did not apply at all to a technology development program). In sum, as the court of appeals observed, petitioners have pointed to no case requiring an agency to analyze the effects of its action on a proposed but highly contingent future project.[3] Pet. App. 10a-11a.

d. The City also contends (Pet. 23-25) that the court of appeals' decision leaves "federal agencies * * * free to ignore" state and local water-management plans, raising federalism concerns. FWS did not "ignore" petitioners' water-supply plans, however; it consulted extensively with state and local authorities throughout the decision-making process, even long after the FONSI was complete, and reasonably determined that the possibility of a reservoir was too speculative to be proximately affected by the refuge designation. NEPA does not require any more than that. To the extent petitioners contend that FWS's substantive decision to desig-

[3] Petitioners also argue (Pet. 17-18; 08-1524 Pet. 28-31) that the 20-year time horizon selected by FWS was arbitrary and capricious. The court of appeals correctly rejected that argument. Pet. App. 13a-14a. The decisions that petitioners assert conflict with the court's conclusion simply evaluated specific time horizons in light of the action at issue. See, *e.g.*, *Selkirk Conservation Alliance* v. *Forsgren*, 336 F.3d 944, 962-963 (9th Cir. 2003). And in any event, FWS's decision not to further address the potential impact of not building the reservoir was based on its reasonable conclusion that the reservoir might not be built at all—a conclusion that did not depend on any particular time horizon.

nate the refuge notwithstanding petitioners' objections impinged on state sovereignty, NEPA—a procedural statute—does not provide a vehicle for such a challenge. And although petitioners asserted Tenth Amendment claims below, they have not renewed those claims, which the court of appeals rejected as meritless and waived, before this Court.[4] Pet. i; 08-1524 Pet. i.

2. The City next contends (Pet. 18-21) that FWS arbitrarily and capriciously failed to consider an adequate range of alternatives, including alternatives that would have permitted both the reservoir and the refuge to be built. But an EA need only consider a reasonable range of alternatives that would serve the purpose of the proposed project. See, *e.g.*, *Highway J Citizens Group* v. *Mineta*, 349 F.3d 938, 960 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004). Here, the court of appeals correctly upheld FWS's conclusion that it could not evaluate a dual-use proposal without knowing any specifics as to where a reservoir might be built; how large it would be; and whether it would be built at all. Pet. App. 9a.

In any event, petitioners made clear after the comment period had closed that they believed that the reservoir and the refuge could not co-exist, as their alternative proposals all would have required FWS to abandon the Upper Neches site entirely, and would have destroyed a significant portion of the riparian corridor. Pet. App. 9a. But as the court of appeals found, preserving the Upper Neches habitat was the very purpose of

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[4] FWS also did not contravene 40 C.F.R. 1506.2(b), which requires agencies to coordinate with state and local agencies. See 08-1524 Pet. 28. By its terms, that provision is directed to minimizing "duplication between NEPA and State and local requirements," not the circumstances in which an agency may decline to consider a possible impact on a state proposal.

the contemplated action. *Ibid.*; *id.* at 3a; Gov't R.E. 3517-3518. Petitioners point to no decision suggesting that NEPA required FWS to consider alternatives that would obviate the purpose of the planned action.[5]

None of the decisions on which petitioners rely (Pet. 20-23) conflicts with the court of appeals' holding, as all evaluated the relevant agency's consideration of alternatives in light of the specific facts of each case, often in the context of reviewing the more extensive analysis required in an EIS. See, *e.g.*, *Center for Biological Diversity* v. *National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008) (agency refused to consider reasonable, less environmentally damaging alternatives submitted by parties); *Davis* v. *Mineta*, 302 F.3d 1104, 1120-1122 (10th Cir. 2002) (agency refused to consider in EA proposed alternatives that were feasible and less damaging to the environment); *Muckleshoot Indian Tribe* v. *USFS*, 177 F.3d 800, 813 (9th Cir. 1999) (EIS involving transfer of old-growth forest to private companies insufficient where agency failed to consider alternatives that would have been more protective of the forest and therefore more consistent with agency's stated policy goals); *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 669-670 (7th Cir. 1997) (agency may not artificially limit its consideration of viable alternatives to those preferred by the beneficiary of the pro-

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[5] As the court of appeals noted, Pet. App. 9a, even had these alternatives been consonant with the purpose of the designation, they were not presented during the comment period. See *Public Citizen*, 541 U.S. at 764-765 (challengers should present proposed alternatives during the comment period). Contrary to the City's suggestion (Pet. 22), requiring those challenging an EA to present proposed alternatives during the comment period does not improperly "shift[] the burden" of compliance with NEPA.

ject); *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) (EIS, which must consider "every" reasonable alternative, should have considered alternative locations because the proposed action was not tied to a particular location), rev'd on other grounds *sub nom. Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); see also Pet. 21-22 (citing decisions and regulations applying to EIS).

3. The City next contends (Pet. 29-34) that FWS relied on "outdated" data in its EA, pointing to FWS's use of some data from its 1988 EA. Pet. 32. The only allegedly outdated data that the City identifies, however, related to the amount of bottomland hardwood cover; the City contends that the hardwood cover on the refuge site had diminished in the interval between 1988 and 2004, making the Upper Neches site less effective as a wildlife refuge. *Ibid.* But an EA need only contain "sufficient" information to enable the agency to decide whether an EIS is necessary, 40 C.F.R. 1508.9(a)(1), and FWS performed its own examination of the site in 2004, concluding that notwithstanding hardwood diminishment, the site remained appropriate for the refuge. Pet. App. 48a. The court of appeals correctly held that that was sufficient for purposes of an EA.[6] *Id.* at 12a-13a; see *Public Citizen*, 541 U.S. at 767 (noting "rule of rea-

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[6] The court did not assume, as the City suggests (Pet. 33), that reliable data were not necessary because the refuge designation was conservation-related. Rather, the court distinguished the decisions on which petitioners relied as involving situations in which the agency was considering whether to undertake environmentally harmful actions, and failed to obtain adequate data on the extent of the potential effects. Pet. App. 12a. Here, the City challenges FWS's reliance on its own examination (as well as data) in applying its expert judgment and concluding that the refuge site was an important habitat that should be preserved.

son" applicable to EAs). The City's argument therefore reduces to a disagreement with FWS's ultimate decision to designate the refuge. But NEPA requires only that the agency make an informed decision; it does not require an agency to reach any particular substantive result. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

In arguing that the court of appeals' decision deviates from those of other circuits, the City relies (Pet. 31-32 & n.14) on inapposite cases concerning the "scientific integrity" requirements applicable to an EIS under 40 C.F.R. 1502.24, or procedural situations not presented here. See, *e.g.*, *New Mexico ex rel. Richardson* v. *Bureau of Land Mgmt.*, 565 F.3d 683, 704-707 (10th Cir. 2009) (evaluating sufficiency of data in EIS); *Idaho Sporting Congress Inc.* v. *Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (disapproving use of supplemental reports to present omitted data because such reports are not contemplated by NEPA or its regulations); *Seattle Audubon Soc'y* v. *Espy*, 998 F.2d 699, 704-705 (9th Cir. 1993) (EIS for adoption of spotted owl management plan failed to consider new scientific uncertainty regarding evidence on which the agency's strategy rested).

4. TWDB next contends (08-1524 Pet. 32-37) that the court of appeals' holding that FWS reasonably concluded no EIS was necessary conflicts with the Tenth Circuit's decision in *Catron County Board of Commissioners* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429 (1996) (*Catron County*). TWDB is incorrect.

In *Catron Country*, FWS argued that it was not required to consider the environmental impact of its designation of a critical habitat under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, because the ESA entirely superseded NEPA's requirements. In support

of that argument, FWS contended that NEPA compliance was unnecessary because a critical-habitat designation could have only beneficial environmental effects. *Catron County*, 75 F.3d at 1437. In rejecting that position, the court stated that NEPA broadly applies to all federal action, regardless of whether a proposed action is projected to have a beneficial or detrimental effect on the environment, and it also noted that the fact that the action in question was taken pursuant to the ESA did not necessarily mean that it would have no detrimental effects on other aspects of the environment. *Ibid.*

Because the only question at issue in *Catron County* was whether the agency's action was entirely exempt from NEPA's requirements, the court had no occasion to consider when an agency proceeding in accordance with NEPA need not undertake an EIS. Here, in contrast, FWS has never contended that NEPA does not apply to the designation of the refuge. Rather, the agency complied with NEPA's framework, and determined that its action would have no significant environmental effects necessitating an EIS. The court of appeals approved that determination because FWS complied with NEPA in preparing an EA, "made a reasoned decision that there were no significant environmental effects" flowing from the establishment of an acquisition boundary, and "properly * * * made a FONSI." Pet. App. 17a; see *Public Citizen*, 541 U.S. at 764. There is thus no conflict between the decision below and *Catron County*.[7]

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[7] For the same reasons, any conflict between *Catron County* and *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996), which held that the ESA's procedures superseded NEPA (see 08-1524 Pet. 34-35), is not implicated here.

Nonetheless, TWDB suggests (08-1524 Pet. 35-36) that the court of appeals assumed that all boundary designations and conservation-related actions necessarily will not have any detrimental environmental effects, thereby diverging from *Catron County*. To the contrary, the court simply stated that, in addition to the lack of proximate relation to any effect on the City's water supply, FWS's FONSI was supported by the fact that the designation would not effect any current physical change in the land or alter the way in which the land is currently used. Pet. App. 18a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669, 680 (5th Cir.), cert. denied, 506 U.S. 823 (1992), which approved a FONSI in similar circumstances, where the boundary designation did not alter the existing land use in any way and any effect on future water supply was not proximately related). The court's approval of the FONSI was thus based on the specific characteristics of the refuge designation at issue in this case.[8] *Id.* at 6a-18a. The court's fact-bound conclusion that FWS reasonably determined that the designation of the refuge would not have a significant impact on the environment is correct, and does not warrant further review.

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[8] Even if the court had made such an assumption, its holding would not conflict with that of *Catron County*, because that decision did not concern the circumstances in which potential environmental effects are significant enough to require an EIS under NEPA.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2010

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No. 08-1524

U.S.
JAN 13 2010
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In the Supreme Court of the United States

TEXAS WATER DEVELOPMENT BOARD,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In opposing the Texas Water Development Board's (TWDB) petition for writ of certiorari, Respondents offer two main reasons for the Court to deny review. First, they claim that, contrary to TWDB's argument, the Fifth Circuit's decision in this case is not in conflict with *Catron County Board of Commissioners* v. *United States Fish and Wildlife Service*, 75 F.3d 1429 (CA10 1996) (*see* B.I.O. 16-18, ¶ 4). Second, they attempt to downplay the importance of the Fifth Circuit's decision here by asserting that it is

entirely "fact bound" (*see id.*, at 8; 9, ¶ 1(a); & 18, ¶ 4). Neither of Respondents' claims, however, has merit.

Regarding conflict, *Catron County* holds, among other things, that the National Environmental Policy Act's (NEPA) documentation requirements, 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1508.9, *et al.*, are triggered even though federal action designating a critical-habitat boundary does not change the natural, physical environment. *See Catron County*, 75 F.3d, at 1436-37. That decision conflicts with the Fifth Circuit's decision here—that NEPA's documentation requirements are *not* triggered by federal action setting an acquisition boundary for a wildlife refuge that preserves the physical environment. *See City of Dallas* v. *Hall*, 562 F.3d 712, 723 (CA5 2009) (TWDB App'x 95-96); *see also Sabine River Auth.* v. *U.S. Dep't of Interior*, 951 F.2d 669, 680 (CA5 1992) (same). Not only does the Tenth Circuit's decision in *Catron County* conflict with the Fifth Circuit's decision here, it conflicts with a decision of the Ninth Circuit, too. *See Douglas County* v. *Babbitt*, 48 F.3d 1495, 1505 (CA9 1995) ("NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment."). Thus, there is a circuit split among the Tenth, Ninth, and Fifth Circuits on the same important matter of federal law. TWDB's petition should be granted in order to resolve this split. *See* S. CT. R. 10(a).

Respondents' attempt to characterize the court of appeals decision as "fact bound" is similarly unpersuasive. TWDB's petition raises legal issues that do not involve mere challenges to erroneous factual findings. The decision below is not just fact specific to this case. Rather, this case broadly asks whether NEPA's documentation

requirements must be performed when: (1) the planning horizon of a state or local water-development plan that affects certain lands and water resources exceeds the planning horizon of a competing federal project concerning those same resources; (2) a competing state water project concerns only a proposed reservoir, instead of an existing reservoir; or (3) the designation of a wildlife-refuge boundary and acceptance of a negative conservation easement do not alter the physical environment. These are legal questions. Their proper resolution affects important state and federal interests and is a compelling reason for granting review. *See* S. Ct. R. 10.

Argument

I. This Case Affords the Court an Opportunity To Resolve a Circuit Split.

Respondents argue that the Fifth Circuit's decision in this case does not conflict with the Tenth Circuit's decision in *Catron County* (B.I.O. 16, ¶ 4). They claim that *Catron County* is distinguishable from this case (*id.*, at 16-18, ¶ 4). They are wrong.

Respondents assert that "the only question at issue in *Catron County* was whether the agency's action was entirely exempt from NEPA's requirements" and that the Tenth Circuit "had no occasion to consider when an agency proceeding in accordance with NEPA need not undertake an EIS [environmental impact statement]" (*id.*, at 17, ¶ 4). They claim that the Fifth Circuit's decision here is distinguishable from, and therefore not in conflict with, *Catron County* because they have "never contended that NEPA does not apply to the designation of the refuge" (*ibid.*).

This facile distinction, however, does not withstand scrutiny. In both *Catron County* and *City of Dallas*, a critical question was whether a federal agency's noncompliance with NEPA's documentation requirements may be excused for federal "actions" that preserve, as opposed to change or alter, the physical environment. The Fifth Circuit in this case and the Tenth Circuit in *Catron County* decided the same legal issue differently.

In *Catron County*, the U.S. Fish and Wildlife Service (FWS) designated 74 miles of river habitat as critical habitat for the spikedace and loach minnow under the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* *See* 75 F.3d, at 1433. The County alleged "that designation of critical habitat would prevent the diversion and impoundment of water by the County, thereby causing flood damage to county-owned property[.]" *Ibid.* The County argued that the designation was improper because FWS had failed to comply with NEPA's documentation requirements, among other things. *Ibid.* FWS, however, responded that its noncompliance with NEPA was excused because ESA's procedures "essentially duplicate the NEPA inquiry" and "displace[d]" NEPA's procedural and informational requirements, and because Congress had endorsed prior judicial and FWS announcements of NEPA noncompliance in conjunction with actions pursuant to the ESA. *See id.*, at 1435-38. To support its argument, FWS relied upon *Douglas County* v. *Babbitt*, 48 F.3d, at 1495.

In *Douglas County*, the Secretary of the Interior designated certain federal land as critical habitat for the Northern Spotted Owl under the ESA. *See id.*, at 1497. In so doing, the Secretary announced that compliance with NEPA's documentation requirements—an environmental

assessment (EA) and an environmental impact statement (EIS)—was not needed. *See id.*, at 1497-98. The district court, however, granted summary judgment for the County, concluding that NEPA applied to the designation of critical habitat and the Secretary had failed to comply with the statute. *See id.*, at 1499.

On appeal to the Ninth Circuit, intervenors in the district court "argue[d] that an EIS [wa]s not required because the federal action at issue d[id] not change the natural, physical environment[.]" *Ibid.* The Ninth Circuit agreed, holding that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." *Id.*, at 1505. In so holding, the Ninth Circuit observed that other courts had reached the same conclusion. *Id.*, at 1505-06 (citing *Sabine River*, 951 F.2d, at 680; *Nat'l Ass'n of Prop. Owners* v. *United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff'd sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (CA8 1981)). In both cases cited by the Ninth Circuit, the courts viewed the federal agency's "'action' . . . as tantamount to 'inaction'" not requiring an EIS. *Sabine River*, 951 F.2d, at 680; *see Nat'l Ass'n of Prop. Owners*, 499 F. Supp., at 1265 (EIS is not required "in order to leave nature alone.").

The Tenth Circuit in *Catron County*, however, expressly disagreed with the Ninth Circuit's decision in *Douglas County*. *See* 75 F.3d, at 1436 ("We disagree with the panel's reasoning."). The Tenth Circuit clearly believed that designating critical habitat does not constitute "inaction." *See ibid.* ("[W]e likewise disagree with the [Ninth Circuit] that no actual impact flows from the critical habitat designation."). The Tenth Circuit held that, even though a designation of critical habitat under the

ESA preserves the physical environment, that fact did not excuse the federal agency's noncompliance with NEPA's documentation requirement. *See id.*, at 1436-38.

The Fifth Circuit's decision in this case holds that FWS's establishment of an acquisition boundary for the Neches River Wildlife Refuge in East Texas (the Refuge) and acceptance of conservation easements for the Refuge "does not effect any change in the physical environment," is "'tantamount to inaction,'" and "will have no significant physical effects such that an EIS is required." *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 95-96) (quoting *Sabine River*, 951 F.2d, at 680). Unlike the Tenth Circuit in *Catron County*, the Fifth Circuit views actions that preserve the physical environment to limit NEPA's reach. The Fifth Circuit's decision, therefore, directly conflicts with the decision in *Catron County* on the same matter of federal law.

These two decisions—in addition to the Ninth Circuit's decision in *Douglas County* and the Fifth Circuit's other decision in *Sabine River*—are irreconcilable. They therefore create nonuniformity among the federal courts on an important issue of statutory interpretation and national environmental policy. *See* Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 1005-06 (1996) (discussing conflict among Ninth, Tenth, and Fifth Circuits concerning whether a habitat designation triggers EIS requirement under NEPA); *see also* Ben W. Alderton, Note, *Must NEPA Always Be Followed to the Letter When Obtaining an Environmental Assessment To Acquire a Conservation Easement? After*

All, Aren't We Maintaining the Environmental Status Quo?, 19 J. NAT. RESOURCES & ENVTL. L. 193, 200-01 (2004-05) (describing question left open by *Sabine River* as to whether a negative conservation easement triggers NEPA at all, noting that the issue has arisen in the context of the designation of critical habitat under the ESA where the environmental *status quo* is maintained, and discussing *Douglas County* and *Catron County*). Because uniformity among federal courts regarding the proper interpretation of a wide-ranging federal statute is important, certiorari review is warranted here. S. CT. R. 10(a); *see. Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where circuits disagreed on proper application of federal statute).

II. CONTRARY TO RESPONDENTS' ASSERTION, THE FIFTH CIRCUIT'S DECISION HERE IS NOT FACT BOUND.

Besides denying that a circuit split exists, Respondents also assert that "review is not warranted" in this case because the Fifth Circuit's decision is "fact bound" (B.I.O. 8). Respondents claim that the determination that FWS acted neither arbitrarily nor capriciously in crafting its EA, issuing a finding of no significant impact, and not performing an EIS when establishing the Refuge is a "fact-bound conclusion" (B.I.O. 8; 9, ¶ 1(a); & 18, ¶ 4). Not so. TWDB's petition points to several purely legal questions that are implicated in this case and that were decided erroneously by the Fifth Circuit.

For one thing, TWDB argued that just because a state or local public-works project affecting the human environment has a relatively long planning horizon and distant start date does not excuse a federal agency from preparing an EIS for a competing federal project that

involves the same natural resources and is set to develop sooner than the opposing state or local project (*see* TWDB's Pet. for Writ of Cert. 20, 28, 29, 30). The Fifth Circuit rejected this argument. It held that FWS's noncompliance with NEPA's documentation requirement was excused, in part, because the State's 50-year water planning process and its plans for developing Lake Fastrill were too far beyond FWS's planning horizon for the Refuge. *City of Dallas*, 562 F.3d, at 718, 719 (TWDB App'x 86, 88). In essence, the court believed that a federal project with a shorter planning horizon trumps a competing state or local project with a longer one. This holding announces a virtually *per se* rule favoring federal agencies.

Whether preparation of an EIS may be avoided, simply because a proposed major federal action affecting the physical environment will occur sooner than a competing state or local project, is a legal question. The Fifth Circuit has declared a broad principle of general applicability concerning NEPA's provisions. Its holding is not merely that the district court properly applied the facts in this case; rather, it represents a judicial determination of the meaning of the term "major Federal actions" in 42 U.S.C. § 4332(2)(C). Because of its statutory interpretation, the court held that an EIS was not needed. This conclusion was not fact bound; it necessarily involved a legal determination. TWDB's petition for writ of certiorari challenges this legal conclusion.

Another legal issue raised by this case is whether FWS's nonperformance of an EIS was excused because the State's and the City of Dallas's proposal for establishing Fastrill Reservoir was still only in a long-range planning phase (TWDB's Pet. for Writ of Cert. 20, 31-32). The Fifth Circuit

held that FWS was not required to analyze the effect of establishing the Refuge on city and state plans for Lake Fastrill, because the proposed reservoir was not an *existing* water source. *City of Dallas*, 562 F.3d, at 719 (TWDB App'x 87).

Deciding whether the Fifth Circuit's existing-versus-proposed distinction is valid under NEPA is a legal determination. The issue of existing versus proposed is not a fact-intensive inquiry. It is a straightforward question of law requiring a policy decision by judges.

Further demonstrating the legal character of this determination, one can easily imagine alternate scenarios involving other existing or potential future federal actions that threaten other types of proposed and as-yet nonexistent state or local public-works projects, not just water-reservoir projects as in this case. As with the first issue discussed, the Fifth Circuit's decision on this second issue is not fact bound—it calls for a legal determination.

Finally, as discussed in section I, *supra*, this case presents a third legal issue—whether designating a refuge boundary and accepting a conservation easement is a major federal "action" triggering NEPA's documentation requirements, or is instead merely "inaction" that excuses the nonperformance of an EIS. The Fifth Circuit held that such activities "do[] not effect any change in the physical environment," and are "'tantamount to inaction.'" *City of Dallas*, 562 F.3d, at 723 (TWDB App'x 95-96) (quoting *Sabine River*, 951 F.2d, at 680). Accordingly, the court concluded that there was no "'major Federal action[] significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(2), and no EIS is necessary under the requirements of NEPA." *Ibid.*

As with the two preceding issues, this issue involved a legal determination. The court interpreted the meaning of NEPA's "major Federal actions" language in § 4332(2) to reach its ultimate conclusion that no EIS was required here. This was not simply a fact-bound conclusion unique to only this case. It involved a question of statutory interpretation, which is, of course, a question of law. What is more, the Fifth Circuit's interpretation is not inevitable. As already mentioned above, the Tenth Circuit has interpreted § 4332(2) differently from the Fifth Circuit. *See Catron County*, 75 F.3d, at 1436-38. Accordingly, review is warranted in this case to resolve this and other legal issues presented in TWDB's petition for writ of certiorai.

CONCLUSION

TWDB's petition for writ of certiorari should be granted.

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January 2010